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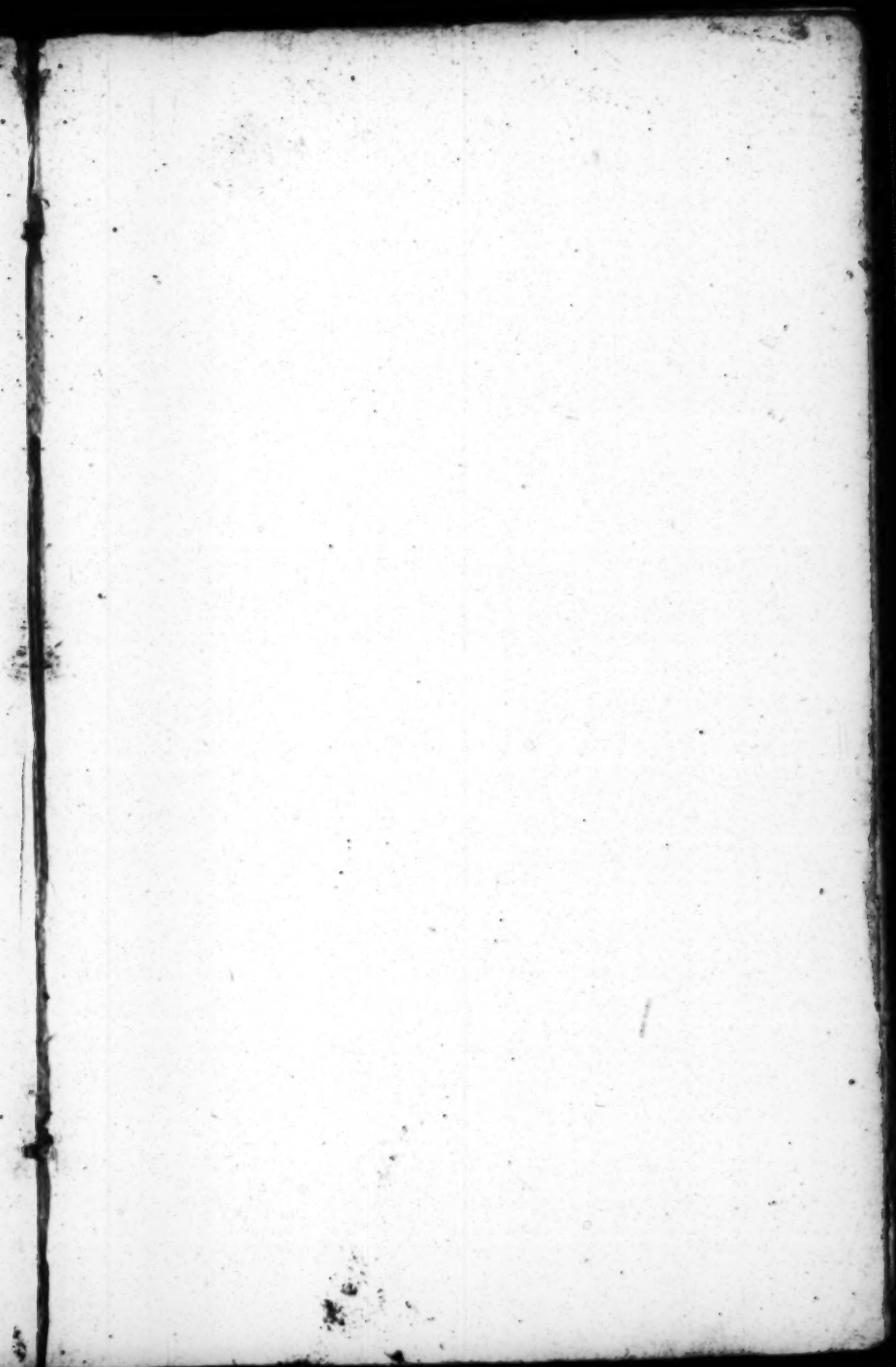
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THE
OFFICE and DUTY
OF
EXECUTORS:

Or, A *TREATISE* of
Wills and *Executors*, directed
to *Testators*, in the choice of their
Executors, and Contrivance of
their *Wills*.

With Direction for *Executors* in the Execution of their Office according to the Law; and
for *Creditors* in the recovery of their Debts.

With divers other particulars, very usefull
and profitable for all persons, be they either
Executors, *Creditors*, or *Debtors*.

Compiled out of the Body of the Common
Law, by *THOMAS WENTWORTH*,
late Benchler of *Lincoln's Inne*.

L O N D O N,

Printed by *John Streater*, *James Fleisher*, and *Henry
Twysford*, Assigns of *Richard Atkyns* and *Edward
Atkyns*, Esquires. 1668.

Cum Gratia & Privilegio Regiæ Majestatis.

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The PREFACE.

AMidst the Readers of these Discourses, some not yet unfriendly may ask, perhaps, *Quorsum hac?* or *Quorsum sic?* Why have we a Tractate and Discourse Legal? or, Why in *English*, and not rather in the Law-language? To whom, yea also to others, perhaps lesse inquisitive, it will be, as I think, a thing not unpleasing, to hear some reason rendred, why I have set my head and hands to this work so little in use with those of our Profession; why also in *English* rather then in the Language wherein our Volumes of Law are for the most part and well-nigh wholly written.

First, for the matter, *viz.* my thus Commenting or making a Tractate upon a Legal Theme.

The Preface.

1. I have long and strongly conceived, that the more Nobles, Gentlemen, and others, shall be acquainted with the Law of the Land, and the Justness, Equity, Prudence and Providence thereof, the more they will love it and affect it. *Ignoti nulla cupido*, The want of knowledge of it, causeth the leanness of love to it. Therefore to bring Nobles and Gentlemen into acquaintance with the Law, is a means as well to advance it in their estimation, as to advantage them by it.
2. I have long thought, that we, who are the Professors of our Law, have been more wanting to it then the Civilians and Canonists to theirs, who have written very many Volumes. *Spartam quam nactus es, hanc exorna*, hath been said of old; and should be assayed anew.
3. More wanting then others before us of our own Profession have we also been, as I think: yet, as of old *Britton, Glanvill, Bracton*, besides not printed,

The Preface.

printed, *Fleta* and *Ingham*, did lead the way ; so since, Master *Littleton*, and, more lately, Sir *Germin Perkins*, *Fitzherbert*, *Stanford*, *Crompton*, *Lambert*, *Kitchin*, Sir *Henry Finch*, *Dalton* , have trodden this path ; so as it cannot be taxed with Novelty or Singularity. I mention not Relaters or Reporters of Judgments and Resolutions , nor meer Abridgers, nor Authours of Books of Entries, expressing forms of Declarations and Pleadings, &c. because these have trodden another, (though for the Students and Professors of the Law a very profitable) path.

The tax and increpation of our late learned and judicious Sovereign upon us the Professors of the *English* Law , as being wholly in effect addicted to our own private gain and advantage, with neglect of the publick, had some strong operation upon me , howsoever upon others; setting for divers years past

4.
King *Jam.*
in his Preface to his
Book against Tobacco.

The Preface.

my pen on work, especially in Summer Vacations, upon divers particular Subjects, whereof this is one, and the first-born.

5. To this I may adde the Crown's expectation of somewhat Legal to be published and set forth from time to time, as appears by the special Patents successively granted and renewed for the sole Printing of Books of Law. There is one such in force at this present, and another long hath been in Remainder and expectancy to take effect upon the expiration thereof.

6. And now to adjoin *Sic* to *Hæc*, viz, the reason of my *English*-writing, to that of my writing upon a Law-Theme. First, receive the said late King's judgment touching both, expressed in one of his Speeches printed. " Thus I wish, saith he, the
" Law written in our vulgar Lan-
" guage : For now it is an old mixt
" and corrupt Language, onely un-
" derstood by Lawyers ; whereas
" every

March
1609.

Nasc.

The Preface.

“every Subject ought to under-
“stand the Law under which he
“lives, &c.

Herein *Andrew Horn*, one some-
time of our Profession, agreeth with
the said late King, saying, *Abusio est*
que les Leges ovesque leur enchesons
ne soient scaus & connus del tous :
It is an abuse, saith he, that the
Laws with the grounds be not
known by all. *Ergo*, to be in a
Tongue understood by all.

7.
In his Mir-
rour of Ju-
stice.

More plainly and fully doth that
our both well-learned and well-
descended Sir *Germin* sing in con-
sort with our said late scientious
King. For he first brings in the Do-
ctour of Divinity, saying that
henceforth he will take more pains
then before he had done to know
the Laws of *England*; for that
knowledge is *multum necessaria &*
Clericis & Laicis, imò omnibus in hoc
Regno commorantibus, etiam in foro
Conscientie. And this being in his
first Book written in *Latin*; after
writing

8.

Lib. I. c.
24.

The Preface.

writing his second Book in *English*, he expresseth that he so did for this reason, *viz.* To the end that it might be understood by all.

9.

Which of us hath not heard it objected, that we the Professors of the Law seek to hide and secret the knowledge thereof under that dark and distasted Language wherein the Law is for the most part written? Not that I hold it any just excuse for the nescience or negligence of any, that our Books are not in *English*: since, first, it were easie for any diligent and intelligent man, specially if acquainted with the right *French* Language, to understand our broken or brackish *French* in a few days. Secondly, There be both Statutes and some other Law-books in *English*, which are neglected by the most. Thirdly, Though care hath been taken in Parliament in *Edw.* the third's time, that Lawyers should plead, that is, argue and debate Causes,

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Causes, in *English*, which was often desired by the Nobles and Commons, till at last assented and enacted; and in Q. *Marie's* time care was taken, that the Commissions of Purveyors should be in *English*, to the end that all Subjects from or of whom they would take might both see them to be persons authorized, and so also in what manner they are directed to use their Authority, according to the Prince's pious and princely care, that his Subjects should not be abused by his Officers: Yet for this Affair, of having all the Law-volumes speak *English*, I have not heard nor read of any desire or endeavour in Parliament. Fourthly, If the Annals and Reports were in *English*, they are so replete with Debates about forms of Writs, Returns, Pleadings, Essoigns, Imparlances, Protections, Vouchers, Aid-priers, and Counterpleas of both, and the like, as would easily distaste and discourage any,

2 & 3 Ph.
& Ma. c. 6.
in fine.

The Preface.

not intending to profess and practise the Law, from versing much in them, or passing through them. This therefore, as I think, would not much effect the expressed desire.

10. The thing (in my judgment) fit and fruitfull to produce that good effect would be, to have Extracts of the Materials of the Law, and that not without some good choice and selection, composed in way of Discourse, or Tractate expository, and that in *English*.

11. I cannot well see or comprehend how any one Legal part or Theme may be more usefull to and for the generality of men, and consequently more generally expetible and wished for, then the *Office of Executors*. For who almost is there, who either is not, or may not be an Executor or Administrator; or at least hath not, or may not have to doe with them, either to receive from them, or to pay to them Debts or Legacies? Or who is there above

Forma

The Preface.

Forma pauperis, that may not be a Testator or Will-maker, to the guidance of whom, even in the choice of his Executors and contrivance of his Will, it cannot but be material to know the Office and Duty, the Right and Interest, the Power and Authority of *Executors*; yea of each one Executor, where there be divers; yea, to know who may be made an Executor, who not; who can make one, who not; how he may be fashioned, generally or specially; what shall come to him, what cannot be given from him; yea, what Goods or Chattels shall go from him, though not given from him? Besides the knowledge for those others necessary, of the safest Wards or Locks for Executors, their *Scylla* and *Charybdis*, and the best advantage for Creditors, &c. towards or against them. To me, considering what parts of Law were most behovefull to be communicated to all willing Readers,

(a 2)

The Preface.

ders, none appeared which could challenge of this the precedence, and therefore I gave it the first and leading place. Thus mine own thoughts. But how far this Discourse may be profitable to any, and to how many, *aliorum sit judicium*. How many know no more of these, then of the way of a Ship upon the Sea?

12.

Lastly, These are not intended for the Learned of our Profession, who have drawn, or can draw, out of the same Fountain which I did, and so need not my help; but for their sakes who are not Professors of the Law: yet so, as if any young Students may in any part receive fruit by my Labour, I shall not grudge or repine at their so doing. *Bonum quò communius, èò melius.*

The End of the Preface.



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THE
OFFICE
OF AN
EXECUTOR.

THE INTRODUCTION.



THE things considerable
touching Executors may
all, in effect, be reduced
to these three Heads,
viz.

1. Their *Being*.
2. Their *Having*.
3. Their *Doing*.

By the first I intend their Creation
or Constitution, with the incidents there-
to. By the second, their Interest, Frui-
tien, or Possession. By the third, their
Managing and execution of their Office.
This last was and is the thing principally

B

in

The Office of

in my intention, and the chief aim of this Discourse; but necessarily it must have some *Ingredients*, some *Concomitants*, and some *Consequents*: as he that travelleth from *London* to *York* to speak with *J S* must needs pass by and through other *Towns* and *Villages*, and speak with divers other persons in his *Journey* and *Return*. To come first to the first; therein we will consider these six things.

CHAP. I.

1. **W**Hether an *Executor* and a *Will* be such *Relatives*, that one cannot be without the other; and therein of the several kinds of *Wills*.
2. How and in what words an *Executor* may be made and created.
3. How he may be in special manner, different from the general, fashioned, limited, or qualified.
4. Who may make, or be made an *Executor*, who not.
5. What one may give or bequeath by *Will*, what not.
6. How

6. *How a Will or Executor once made may be unmade, and what shall amount thereto, viz. a Revocation total or partial; what to new Publication.*
-

Of the Relation between a Will and an Executor.



AS to the first; the very name of *Executor* purporteth in general one to *execute* somewhat, or to whom the *execution* of somewhat is committed or recommended. In one particular therefore an *Executor* of a Will must needs be such a one to whom the execution and performance of another man's Will after his death is commended or committed; or who is constituted or authorized by the Will-maker to doe him that friendly office. Hence it followeth necessarily, that a Will is the onely Bed where an *Executor* can be begotten or conceived; for where

The Office of

Plow. Com.
185. in Wood
and Darcie's
Case, so ex-
pressly said.

Testamen-
tum, quasi
testatio men-
tis.

no Will is, there can be no Executor : and this is so conspicuous and evident to every low capacity, that it needs no proof or illustration. On the other side, though much may be written in the name of a Will, many Legacies bequeathed, and many things appointed to be done ; yet if no Executor be named, there is no Will : for these two be so relative and reciprocal, as that one cannot be without the other ; if no Will, no Executor ; if no Executor, no Will. Yet here are two Cautions to be affixed : 1. That a man's Mind, Will and Intent touching the disposition of his Goods being declared, although for want of naming an Executor he die intestate, so as Administration is to be committed ; yet for that here is not onely an inchoation or inception of a Testament, but so far a progression therein as *testatio mentis*, that is, the manifestation of the mind of the party deceased, and owner of Goods ; therefore this mind and intention of the Intestate being notified and made known to the Judge, who is to commit Administration, is usually annexed (as I take it) to the Letters of Administration ; and meet so to be, for a direction for and to the Administrator,

ministrator, as well as to the Will fully and perfectly made, but refused to be proved by the Executor, which is usual. Another Caution is; Where a man seised of Land in Fee-simple disposeth the same, or part thereof, by his Will in writing, this standeth good for the whole or part, according to the difference of the Tenure, although no Executor be named: so as the party dieth intestate, and Administration is to be committed, as touching his Goods; and yet hath a Will, as touching his Lands. This may seem strange: but the reason thereof is an Act of Parliament, inabling to dispose of Land by Will in writing; and for that, Land is not properly Testamentary; neither hath the Executor (if any be) any thing to do or intermeddle therewith: and therefore is the making or not making of an Executor, nothing pertinent to the validity or invalidity of this devise or disposition of Lands by Will. So as, though where there is not *Testatio mentis*, there is not *Testamentum*; yet may there be the first without the latter. Having now seen that Bequests of Legacies, without making of Executors, doth not amount to a Will: let us now consider whether the sole making of Executors, in the name of a Will,

Sum. Silv.
fol. 32. b.

without giving any Legacy, or appointing any thing to be done by Executors, whether, I say, this be or amount unto a Will or not; since here, upon the matter, nothing is willed, and consequently nothing rests to be executed by the Executors, whose office is, as hath been said, to execute the mind, will and intent of their Testator; and, *Ubi non est testatio mentis, non est Testamentum*, say the Canonists. For answer hereunto, confessing that indeed to be the office of an Executor, I yet conceive confidently, that in the case above put there is a good Will, and as a Will it is to be proved, and approved, for these reasons. First, for that the main part and principal part of an Executor's office, and that which concerns the soul of a Testator, (as our Books speak) is the payment of his Debts: now who knows not that the very making of an Executor is the constituting of such a person who is to pay all Debts? and for that cause and end is principally to have and enjoy all the Goods and Chattels of the Testators, and all sums of money to him owing. So as the naming of *A* and *B* Executors, is by implication a gift or donation unto them of all the goods and

and chattels, credits and personal estate of the Testator, and the laying upon them an Obligation to pay all his Debts, and making them subject to every man's Action for the same. And if the Law speak thus much, since *Quod necessario subinteligitur non deest*, what need then the party express it in his Will? If he had willed more then this, as to have given this or that in way of Legacy, it had been needful for him so to have set down in his Will; but there is no meer necessity that every man should give Legacies in his Will: the Estates of many will not doe more then pay their Debts, nor oftentimes doe so much; so as if they should give any Legacies, it must be a dead and a void gift. And suppose a man hath much more, and intendeth all to his Wife, Brother, or Sister, or other Friend, his Debts being by such persons paid; since the very making of the party Executor without any more amounteth to thus much, and effecteth this, what needeth then more words; *Frustrà fit per plura quod fieri potest per pauciora*; as we often speak touching Legal passages, It is needless to write four lines, where two be sufficient. Nor is *testatio*

The Office of

mentis here wanting, since the Testator hath made known who shall have the Administration of his goods for payment of his Debts : and it is to be presumed he had no more special Will, since he did not declare more, and left his Executors farther to have and to doe *prout Lex postulat*. And who can say here is nothing to execute ? Is the suing for and collecting of Debts due to the Testator, and paying of Debts by him, nothing ? Nay, it is, *in hoc negotio*, the *unum necessarium*. Besides, the making of an Executor is a designment of a person to be the Testator's Assign, to whom and by whom divers things may be feasible, by virtue of Covenants, Bonds, or other Assurances ; as after, where we come to shew how the Executor represents the person of the Testator, will appear : also of one who, as our Books often speak, is to dispose the Testator's goods for the best advantage of his Soul ; but in stead of that, (since as the Tree falleth, so it will lie or rest) I will say, as is most for the honour and reputation of the Testator.

Of the kinds of Wills.

NOW Wills are of two kinds, or may be two ways made, viz. either by writing, or nuncupative, that is, by words not put in writing during the Testator's life; for after the Testator's death this verbal Will must be reduced to writing, and have the Seal of the Ordinary, or Judge Spiritual, thereto affixed: and then it is as effectual, and of as good validity, as if it had been in writing in the Testator's life-time; and so doth the Common Law allow and approve thereof.

4 Hen. 6. 10
E. 4. 1.
If it be written, and brought to & approved by the Testator in his life, it is a Will in writing.

14 H. 6. 5.
Vid. 5 H. 5.
1. M. 15. and
16 Eliz.

But I advise all to make Wills by writing, and not to leave them to the doubtful fidelity or slippery memory of Witnesses. For as of Leases parol hath been said, that they be Leases perjured, or of perjury; so of Wills parol may be feared. Besides, many times a man doth speak and declare this or that part of his Will, which his wife, child, or friend dissuading, he letteth that purpose and part of his Will to fall, and departs from it: yet Witnesses, wishing it to stand, will perhaps affirm it as part of the Will. As for a Will-gift, and disposition of Land of inheritance, if it be not fully written

6 Ed. 6. Dy.
32.

written before the death of the Testator, or done so far (at least) as concerns the disposition of Lands, it cannot be for that part made good by reducing it to writing after his death. As for Goods and Chattels, it may. Yet if it be written before the death of the Testator, if it be never brought to him, or read to him after the writing thereof, it is good enough; and that not onely for Land, as the Case resolved in King *Edw. 6.* his time was, but also for Goods and Chattels, so as there be an Executor named. But whether shall we say this is a Will nuncupative, or in writing? And, surely, I think that this is a Will in writing, and not onely verbal, though it want subscribing: for we know that many cannot write their names, but onely marks, and what is that? Nay, suppose one wants hands, and cannot write so much as his name; yet doubtless this man may make a Will in writing, it being written by his direction, as his Will which he dictated: nor is the subscribing of the name of the maker any essential part of a Deed, much less of a Will, which needs not sealing, as a Deed doth. Now put we the case, on the other side, that many Bequests or Legacies be
named

named in a Wil, and many things expres-
sed to be done, and no Executor is named
in the Writing, onely by word of mouth
A and *B* be named Executors : This I
think confidently is no Will in writing ,
but nuncupative onely ; for that one essen-
tial part of the Will, *viz.* making of Exe-
cutors, is wanting in the writing. Nay ,
the appointing of him Executor who is na-
med in a Note left with *A B*, is no suf-
ficient making of an Executor , saith the
Summist. And of such nuncupative Wills
Mr. *Perkins* reasonably saith, that it pro-
perly hath place when one, suddenly ta-
ken with sickness violent, dares not stay
the writing of his Will, for fear of pre-
vention by death ; and therefore prays
his Curate and others to witness what his
Will is. To this Will not written there
must be seven Witnesses , and such as
come not by chance, but are especially
called for that purpose , saith the *Sum-*
mist.

Tit. de Test.
Sum. Silv. f.
443. b.
If he survive
and live a
long time,
not causing
it to be
writ or atte-
sted by Wit-
nesses, me-
thinks it
should not
stand as his
Will.
Id. supra, fo.
444. b.

What shall amount to a making one Execu-
tor, or what words are requisite thereunto.

HAVING before made to appear, that
the being of an Executor is an es-
sential

The Office of

sential part of a Will, and so *de esse*, and not *de bene esse* onely, of a Will and Testament: let us now see, first, by what words an Executor may be made; secondly, *de modo*, in what manner it may be done, how the power and authority of Executors may be limited and divided. As to the first, though one do expressly by Will name or appoint any to be Executor; yet if by any word or circumlocution he recommend or commit to one or more the charge and office which pertains to an Executor, it amounteth to as much as the ordaining or constituting of him or them to be Executors: As if he declare by his Will that *A B* shall have his Goods after his death, to pay his Debts, and otherwise to dispose at his pleasure, or to that effect; by this is *A B* made Executor, as was conceived by the Judges in the late Queen's time. And long before that it was held, That if one do will onely that *A B* shall have the Administration of Goods, he is thereby made Executor: yea, in the said late Queen's time, one giving divers Legacies, and then appointing that, his Debts and Legacies being paid, his Wife should have the residue of his Goods, so that she
put

If *A B* be made Executor, and to him and *D* some goods are devised to be disposed for his Soul, *D* is by this an Executor for these.

39 H.6. Dy.

290.

M. 15 & 16 Eliz.

21 H.6.6,7.

put in security for the performance of his Will ; by this, without more, was she an Executor, as was held by three Justices, (*viz.*) *Manwood*, *Harper* and *Mounson*, in the Lord *Dyer's* absence. And so also where an Infant was made Executor, and *A* and *B* Overseers, with this condition, That they should have the rule and disposition of his Goods, and payment and receipt of Debts, unto the full age of the Infant ; by this were they held to be Executors in the mean time. And if *A* be made Executor, and the Testator after in his Will expresseth that *B* shall Administer also with him, and in aid of him ; here *B* is an Executor as well as *A*, and if *A* refuse, *B* alone may prove the Will as Executor, notwithstanding it be onely said, he shall Administer with *A*, and in aid of him. Thus many ways, and by divers words of implication, one may be made Executor, although not expressly so named by the Will. But if *A* be made an Executor, and *B* a Co-adjutor, without more, he is not by this an Executor with *A*, as in *K.H.6.* his time was held : nor hath such Coadjutor or Overseer any power to Administer, or intermeddle otherwise then to counsel, persuade, and advise ;
yet

21 H. 6. 6. yet I think he may, and in Conscience
 24 Ed. 3. should so doe. And if that will not pre-
 F. Exec. 121. vail to rectifie negligence or miscarryings
 29 Ed. 3. 39. in Executors, he shall well perform the
 trust reposed in him, if he complain in
 the Spiritual Court, or Court of Consci-
 ence: and it is reason, I think, that so do-
 ing upon just cause, his charges be born
 out of the Testator's estate, or the Execu-
 tor's purse who otherwise would not be
 reformed.

*How an Executor, or his Executorship, may
 be limited or qualified in special manner,
 different from the general.*

NOW let us see how this making of an
 Executor may be specially qualified.
 And first, the time may be limited when he
 shall first begin to be Executor; and that
 either certainly, or with some contingen-
 cy. Secondly, the creation may be con-
 ditional. Thirdly, it may be partial, or
 dividedly, and not intirely.

As to the first, one may appoint
 J. S. to be his Executor a year or
 more time after his death; this is good.

So

So also if *A* appoint *B* his Son to be his Executor when he shall come to full age, and in the mean time he dieth intestate. Again, one may appoint the Executor of *A* to be his Executor: and then if he die before *A*, he is Intestate untill *A* die. This creation may also be conditional, and the condition may either be precedent or subsequent. In the time of King *H. 6.* one did name *A* and *B* his Executors, and if they would not take it upon them, then *C* and *D* should be his Executors, and then there *A* and *B* refused, and the question was, whether in Suit against the Debtors of the Testator, *A* and *B* should join with *C* and *D*; as where four Executors be named, and two refuse, and the other two prove the Will, yet all four must be named in Suit against the Testator's Debtors, as was there admitted: but in the principal Case it was resolved, That the Suit should be onely in the name of *C* and *D*, for that the appointment of them Executors if *A* and *B* did refuse, did imply that then they onely should be Executors; and here all four were never made, nor intended to be Executors, but *A* and *B*, upon a condition subsequent

*Vide Gros-
brook &
Fox. Plowd.
A and B
made Exe-
cutors, but
not B to in-
termeddle
during the
life of A;
and good.
32 H.8. Bre.
155.
3 H.6. fo. 6.*

sequent, that they should not refuse; and *C* and *D*, upon a condition precedent, *viz.* if *A* and *B* did refuse. It is usual to make one or more Executors conditionally, that they put in security to pay Legacies, or, in general, to perform the Will; nor was it ever doubted, as I think, but that this was good: yet I should advise that such Condition be plainly thus expressed, *viz.* either thus, that if *J S* do put in security, &c. by such a day, then he shall be Executor, else not; or thus, *viz.* to make him Executor conditionally, that before he do Administer (Funeral perhaps excepted) he shall put in such security; else, perhaps, he being Executor till the Condition broken, in that mean time he may have disposed of all or most part of the Testator's estate. In the late Queen's time there was a Case remarkable to this purpose: One Willed, that if his Wife suffered *J S* to enjoy *Black-Acre* (being belike part of a Joynture) for three years, then she should be his Executor, or else *A B* should: and the question was in the *Common Pleas*, Whether presently, before the end of the three years, she were Executor; or not till she suffered the

P. 33 Eliz.
Alice Francis
 in her Case.

the Land to be enjoyed three years; and it was held by all the Judges but the Lord *Anderson*, that she was presently Executor, untill she should disturb *I S. &c.* For upon that done, it was agreed that the Executorship would by virtue of the Condition be transferred from the wife to *A B.* But now during these three years might she have disposed of all the goods of her husband, yea, within one of these three years, and less time, and then have broken the Condition, and have left to *A B* a dry Executorship.

Now to the third Point, one may divide his Executor's power three ways, 19 H. 8. 3.
19 H. 8. Dy.
4. Hil. 33
Eliz. in com.
banc viz. Really, Locally, or Temporally. Really thus: He may make *A* his Executor for his Plate and Household-stuff, *B* for his Sheep and Cattel, *C* for his Leases and States by extent, *D* for his Debts due unto him; and so divide the Power and Administration of his Executors at his pleasure. He may divide them also or their power Locally: viz. *A* for his goods in *Com. Buck.* *B* for those in 32 H. 8 Bro.
115. *Com. Oxon.* and *C* for those in *Com. Berk.* He may also divide them in Time: viz. his Wife or any other person to be Executor during her life, or during the minority

C

nority of his Son, or so long as she continues Widow, and after his Son to be Executor. So of like limitations or divisions, either for time, place, or things, where-with they shall intermeddle. Nay doubtless, one may be made Executor for one particular thing onely, as touching such a Statute, or Bond, and no more; and thereof good use may be made, as I think, thus. Many have Bonds, Statutes and Recognizances, for warranty or enjoying of Land, or freeing or saving harmless from incumbrances, in general or particular. Now he which hath these, selling the Land, may by Letter of Attorny lawfully assign them to the party who buieth the Land or Lease: but this notwithstanding, the interest remains in him who selleth, and by his Outlawry they may be forfeited, or by him released, any Bond to the contrary notwithstanding; and if he die, the interest in Law will be in and go to his Executors, and in their names onely Suit or Execution may be had and maintained.

Quer. If not
Asses in
Law, when
obtained.

Now then, if the Vendor, besides assignment, make, as to the Statute, Recognizance, or Obligation, onely the Vendee Executor: by this the interest, after death

death of the party, will be in him actually and really to his more safety, since none but he can release or discharge, nor any other name need to be used to sue, or take benefit thereof. But *Quar.* if the Vendee, his Heirs and Assigns, may be made Executors, so as that security shall go to them one after another, without renewed making of Executors. Thus if the party make no other Executor, he dieth Intestate as to the rest of his estate; and as to this specialty onely shall have an Executor, and must have a Will proved: And in case he do make another Will for his estate residue, there must be two Wills proved. But in the other case, where by one onely Will one is Executor for one part of the estate, and another for another, there being but one Will to be proved, one proving of it sufficeth. And though in the premisles of a Will two be made Executors jointly and equally; yet there may be a *Proviso*, that one shall not meddle during the others life, so as they shall be Executors successively, and not jointly. And thus also to other purposes aforesaid, a subsequent Cause or *Proviso* may make the partition and division of authority. But if the *Proviso* or

32 H. 8.
Bro. Execi
55.

29 H. 8. Dy.
5. 4.

clause subsequent be meerly contrary to the premisses, it will be void : as where two were made Executors with a *Proviso* or Clause, that one of them should not Administer his Goods ; this was held void for repugnancy by *Brudenel* and *Englefield* Justices. But *Fitzherbert* Justice was of mind that it was not void, nor utterly repugnant : for the other might join in Suits, though not administer. And Justice *Shelly* was of a third opinion different from all the rest, *viz.* That here was a repugnancy, but the last Clause should controll the Premisses : and so this one onely should be Executor.

Who may make an Executor.

SOME persons may be unable to make Wills, and consequently Executors, for that is all one : whosoever may make a Will, may make an Executor. There be nineteen several kinds of persons unable, as the *Canonists* say, to make Wills : but with many of them we will not intermeddle, because we find no mention of them in our Law. The persons principally and most usefully to be consider'd of by us are either the defective in understanding,

as Infants, Idiots, Lunaticks, and the like; or defective in power or Interest, as women covert or married, persons outlawed, attainted, convict, or excommunicate. Some touch we will give of others; as Aliens, Corporations, Villains, Monks and Priars. As for Infants and women covert, because much is to be said of each of them and their Administrations, we will forbear to treat of them in this place, but after will do it of each severally.

To begin with an Idiot; naturally he is not able to make a Will, as was resolved in the Spiritual Court, because he wants the use of Reason to conceive what it is fit for him to will: nor doth the Common Law oppose this, as I think.

3 Eliz. D.
203, 204.

A Lunatick, having *Lucida intervalla*, that is, some seasons of enjoying his right mind, and freedom from his Lunacy, may in those times of his right mind make a will & Executors, else not; for even one by age or sickness become of *non sana memoria* is unable to dispose of lands or goods.

One deaf and dumb born may make a Grant, saith Mr. *Perk.* if he have understanding, which is hard, as he confesseth, consequently much more a Will; but in the time of King *Hen. 1.* it is left a

Vide pluri in
Perk. 5. 6.
33 H. 8.
Dy. 55, 56.
Vide 26 E. 1.
3. 63. *Lib.*
Intr. 396.

8 Ed. 3. 53. Demurrer, whether a Deed by such be
 6 Ed. 3. 63. good or not. If but mute, he may wage
 o in effect his Law, and attorn by signs, and so per-
 4 Aff. p. 39. haps by signs declare his Will. 44 Aff.
 2. 81 Eliz. p. 36.
 Pascaria de
 Fountain's
 Case.

An Alien may make or be an Execu-
 tor, so as he be not an Alien enemy, for
 such cannot sue, as in the late Queen's
 time was held: but there the doubt was,
 whether a Subject of *Spain* were at that
 time to be held an enemy, no war being
 proclaimed between the Kingdomes,
 though hostility exercised.

As for persons Attainted, Convicted,
 or Out-lawed, it will be said, that these
 can have no Goods of their own, and
 consequently they can make no Wills,
 nor Executors; and it is not to be deni-
 ed, that we find it pleaded sometimes by
 Executors, that their Testators stood
 out-lawed. But first it is clear, that all
 and every of these may have Goods as
 Executors to others, which neither are
 forfeited by Attainder or Out-lawry, nor
 devested by marriage or Villainage. There-
 fore, as touching them, they may make
 Testaments. And that all these sorts of
 persons may be Executors, is also evident.
 So also touching Villains, Monks, and
 Friars,

Friars, who can have no goods to their own uses. And that one attainted of Felony may have an Executor, appears by the Case in the late Queen's time wherein it was long debated, Whether such an Executor might maintain a Writ of Errour, or not, to reverse the Attainder of the Testator. And as for other Out-lawries, the Plea thereof by the Executors, that their Testator was and died out-lawed, proves not a nullity of the Will, or Executorship; for then they might have pleaded, that they were never Executors. But it tends to this, that no goods did or could come to them for satisfaction of the Debts, by reason of Out-lawry; yet it hath been delivered, not of old onely in many Books, but by some of late, that Debts upon Contract, where the Defendant may wage his Law, are not forfeited by Out-lawry, nor uncertain Damages for Trespas in Battery, or false Imprisonment, &c. *Quer.* of breach of Covenant. But goods taken away by a Trespasser, may yet be forfeited by the Attainder or Out-lawry of him from whom they were taken; for that the property in right still appertained to him, and he might have taken

29 Aff. p. 2.
63. 49 Ed.
3. 3. 50
Aff. p. 15.
33 H. 6. 27.
9 Eliz. D.
26. 2. Contra,
Co. lib. 4.
fol. 95.
19 H. 6. 47.
30 Ed. 3. 4.
16 Ed. 4. 7.
5 Ed. 3. 53.
6 H. 7.

them again wheresoever he found them : therefore the Action for this shall not come to his Executor, but for the other not forfeited it may.

35 H.7. fo.7. Whether an Excommunicated person be able to make a Will or not, may be some doubt, since *Keble* denieth him ability to present to a Church; and in the very point anciently the opinion of *Canonists* hath been negative, but more lately grew affirmative.

*Summ. Silv.
tit. Testam.*

Who may be Executor, more.

42 E. 3.1. **A**N Excommunicate person cannot sue, that is, proceed in Suit as Executor, till he be absolved, there being danger of Excommunication to all that converse with him; but this makes not a nullity of his Executorship, nor overthrows the Suit, but stays it onely from proceeding untill Absolution. As for persons attainted or outlawed, we have before spoken affirmatively in way of proof that they may make Executors, for continuation of the Executorship; so of Aliens and others before. Recusants convicted at the time of the death of any Testator are disabled to be his Executors.

21 H. 6. 30.
A Clark attainted may be an Executor by-past.
Just,
Pascat. de Fountain.
But an Alien Enemy cannot sue as Executor.
P. 31 Eliz.
3 lac. cap. 5.

Whether Corporations compound,
or

or consisting of divers persons, may be made Executors or not, I doubt. First, because they cannot be Feoffees in trust to others use. Secondly, they are a body framed for a special purpose. Thirdly, they cannot come to prove a Will, or at least to take an Oath as others do.

What a man may give or dispose by his Will.

HAVING considered of the makers of Executors by Will, and of them so made; let us now consider what by this Will may be disposed, given or bequeathed. And first, he who himself is an Executor cannot by his Will give or bequeath to any other the Goods, Chattels, or Credits he hath as Executor, the property not being altered; for that he hath not them properly as his own or to his own use: onely he may make a continuation of the Executorship, and his Executor shall have them as Executor to the first Testator, as was resolved by the Judges of both Benches in the late Queen's time. And if he be Administrator, the Bequest is then also void, nor then will they go to his Executor, but to a new Administrator; but on his Death-

*Bransby
vers. Gran-
tham. Plow.
Com. f. 525.*

*Hil. 20
Eliz.*

At any time
in his life
he may alter
the proper-
ty.

So 48 E. 3.
fol. 14, 15.
where the
Bequest was
to one of the
Executors, it
was held,
that the o-
ther Execu-
tor might
release it.

If sufficient,
otherwise to
pay all one
as if none.

48 E. 3. p.
14, 15.
11 E. 3.
Fitz. Tit.
Cond. 9.
where both
stated joint-
ly by one
Grant.
Differences
between
joint Te-
nants and
Tenants in
common,
holding by
several
Grants.

Death-bed he may give them by Word or Deed, though not by Will. Next, if a man have Debts owing to him, as many have much, it is considerable, whether by way of Bequest in his Will he can give away these to any from his Executors. And doubtless he cannot effectually in Law; they being not subject to Assignment unto any, except the King. So as if he give such a Debt to *A*, and such to *B*, yet must the Suit for them be in the name of the Executor; and so also the Release or Acquittance for them; and not in their names to whom the Bequest is. But when they be received, if there be no Debts to pay, the Executor ought to deliver them to the party to whom the Bequest is, and thereunto may be compelled in Court of Conscience, or in the Spiritual Court. Therefore the Case of the bequeathing money payable upon a Mortgage is in this manner to be understood to be good, and not otherwise, as I take it. He that is jointly with any other estated in Lands or Goods, can give no part by his Will, but all will survive: but by Act in his life he may dispose of his part; and the Assignee may dispose of his moiety by Will, yea, though
it

Another
kind of Te-
nants in
common.

It be half an Horse or Oxe, that cannot be divided. So of a Lease of Lands, or Tithes, or Grant of Goods to two, *Habendum*, one moiety to the one, and the other moiety to the other; each may give his moiety by Will. But if one be possessed or estated for years, by Lease, Wardship, or Extent, &c. in the right of his Wife, or have the next avoidance of a Church in her right, he cannot by Will give or bequeath any of these; but, notwithstanding, they will remain unto his Wife upon his death: but yet his Gift or Grant of them taking effect in his life-time would bind his wife, and carry away the interest from her. If one be Tenant for the lives of one or more others, (as oft-times men take Leases for lives of younger persons then themselves) this cannot be by Will disposed of; for that it is no Chattel, nor is it within the Statutes of Wills, for that it is no state of Inheritance. Therefore let the party look to convey it in his life-time, lest it go to an Occupant, *viz.* him who first shall enter. If it be an estate in Land, he must either make Livery, have a Bargain and Sale enrolled, or Covenant to stand seised to the use of his Wife, or some of his

his bloud, or make a Lease for years determinable upon those lives. Good it be by bargain and sale for years, if the thing be in Lease; that so without Inrollment or Attornment the Rent may pass: else a bargain and sale may be made for a month or such like time, and then a Release or Grant of the Reversion in stead of Livery and Seisin. But if a man have a Lease for never so many years, determinable upon life or lives, that is, if such or such live so long, (which unskilled persons call a Lease for lives) this State may well enough be given and disposed by Will, because it is but a Chattel. If a man be seized in Fee or in Tail of Land having Corn growing upon it, and by his Will do give the Corn, and die before severance, this is a good Bequest; because the Corn should have gone to the Executor. So it is also of a Parson touching his Glebe, and a man seized in the right of his wife or his own right but for life. But as for Trees growing upon the ground, these can no otherwise be given by Will, then as the Land it self upon which they grow may be given; of which matter, as not pertaining to the Office of Executors, *viz.* how and in what manner Lands may be given by Will,

Stat. Merton. cap. 2. Vidue possunt legare tam de dotibus quam de aliis, &c.

Quer. If the trees may be devised by the Statute of Wills, without giving the Land it self.

Will, I intend not to treat in these Discourses.

Of the Revocation and Countermand of Wills, and new Publication.

HAVING considered of the making of Wills and Executors, let us, before we come to the Probate, consider of Revocation; for that may take away the force of a Will rightly made. A Will therefore having two parts, viz. *Inception*, which is the making, and *Consummation*, which is the death of the Testator or maker of the Will, there is power in him at any time before death to revoke or alter his Will at his pleasure. Consider we therefore of Revocations, and also of new Publications or Re-affirmance of Wills, in whole or in part. As therefore a Will may be made by word, so also may a Will made in writing be by word revoked or disannulled: for since every making of a later Will is a Countermand and suppression of the former Will; and since a Will may be made Nuncupatively or by word, and so

Omne testamentum morte consummatur.

See the pleading of it by making a later Will.
Lib. Intra. f. 323. b. & 641. a.

so by making a verbal Will one may revoke a written Will : it will thereupon follow, that one by Word may express the alteration of his Mind thus far, that the Will by him formerly made shall not stand, but be revoked and annulled; and this will stand, and be effectual; so as if he after die, without making any new Will, or new Publication, or re-affirmance of the former, he dieth intestate, or without Will. As a Will may be wholly revoked, so also in part. Hereabout a good resolution was in a *Kentish* Case, where one *Ryete* by his Will in writing did give some Gavel-kind Land to one *Harrison*, and five dayes before his death, said, in the presence of Witnesses, that this Gift should not stand, and that he would alter it when he came home; desiring them to bear witness of his Revocation. Now before he came home, he was killed by the said *Harrison*, who caused the Will in writing to be proved; and after he was attainted and hanged for the murther, and his Son, by the Custome of *Kent*, (*viz.* the Father to the Bough, and the Son to the Plough) entred into the Land. And this manner of Revocation by word only

onely was held sufficient, although the Will in writing were not cancelled, nor defaced. And the like Resolution, for verbal Revocation, is implied in the Case of *Forse* and *Hembling*; where it being resolved, that a *Feme Covert*, or married woman, by word Countermanding and Revoking her Will formerly made, when she was a sole or unmarried woman, this was not effectual, nor of force, by reason of her Coverture taking away the freedom of her Will. Hereby it is implied, that another who hath freedom of Will may by word sufficiently revoke a Will in writing; and so was it since also admitted in the Case between *Sir Edward Mountague* and *Ieoffries*, touching the Will of *Sir Io. Ieoffries*: but there a difference was conceived betwixt saying, *I will revoke my will*, (which onely expressed a purpose or intent, and therefore was no present Revocation,) and saying, *I do revoke it*, or, *It shall not stand*, or, *My Heir shall have my Land*; which crossed the gift of it by the Will. And as Wills may be wholly or in part revoked; so may also the Executorship of one or more of the Executors, and yet the Will may stand in all the other parts,

*M. 28 & 29
Eliz. Co. Lib.
4. fol. 60.*

*7 H. 6. fo. 13.
M. 38, 39
Eliz.*

parts; so as there be any one Executor or more unrevoked: but if all be revoked, then the whole Will is revoked, because no Will can stand without Executors: and this Revocation may be by word onely, without being expressed in the will, or any other writing. But I could wish all to express such Revocation in the foot of the Will; or that the name or names of the Executor or Executors so revoked be expunged or blotted out of the Will; and that this be done in the presence of some Witnesses, to testify the act and intent of the Testator.

Again, Revocations may be by act in Law as well as in fact, or by direct and express terms: as in the said Case of *Mountague and Ieffries*, where Land being devised by Will, and the Devisor after making a Feoffment, though there were some defect in the Livery to make it effectual; or if he made a bargain and sale that was never inrolled, or granted the Reversion, but no Attornment had, so as the Land passed not; yet in all these Cases the Will or Gift of Land stood revoked. But in case he had onely covenanted that he would have made such an estate, and not done it; this was held

to

Vide 6 E. 6.
Dy. 74. &
3. & 47. &
Mo. 42. 2.

to be no Revocation. And so by some, in case he do but make a Lease, leaving the Fee-simple as it was : But of this *Quare* ; And, if a difference may not be betwixt making a Lease for years and a Lease for life, which altereth the Free-hold. If a Lease for twenty years be bequeathed to *J S*, and after the Testator maketh a Lease for fifteen years, reserving a Rent ; I take this to be no Revocation of the Bequest : but if the Testator, after this Will made, take a new Lease for a longer term, so as the former Lease is surrendered in Fact, or in Law ; this must needs be a Revocation of the Bequest, or at least an Adnullation thereof ; and that although the Bequest were generally of his Lease, not mentioning the number of years : for this which he now hath is another Lease, and not that which he had at the time of the making of the Will. So, if one give his black Gelding by Will, and after, before his death, he selleth or giveth away that Horse, and buyeth another black one ; this new-gotten Horse shall not pass by the Will, because it was not the Testator's at the time of making his Will. So also, if the Crop in the Barn be bequeathed,

D

thed in *October*, and the party lives till that time twelvemonth, having sold that Crop, and inned a new; this latter Crop shall not pass by the Will, and the former cannot.

Again, as Revocation may be by Alteration of the state of the Devisor in the Land devised; so may it also be by Alteration, in some case, of the state or quality of the person of the Devisor. As if a Woman sole make a Will, and after take a Husband, this, without any more, as is resolved in the Said Case of *Forse* and *Hembling*, doth work a Revocation or Adnullation of the Will; for that else it should be irrecoverable, since she, having lost the freedom of her Will, cannot actually and directly make a Revocation, as we before have shewed. But notwithstanding her Will be revoked; yet in case her Husband before or after marriage with her were bound or covenanted to perform this Woman's Will, if he so do not, by payment of the Legacies therein bequeathed, his Bond or Covenant will stand good, and be suitable against him: as was adjudged touching the Will of *Elizabeth Smaleman*, married after her Will made to one *Wood*, who first was bound to perform it. Yet another Case there is of

of Alteration in the state of the Testator's person, which makes no Revocation of his Will; as if he being of sound mind and ability make a Will, and after becometh frantick. In this case this is no Revocation; so as his Will stands till his death irrevocable, if he recover not. Now of a Will revoked there may be a Reviver by a new Publication; and thereof now.

Of new Publications.

HAVING shewed how a Will may be revoked, and so lose its force; let us now see how, without making a new Will, that so revoked may be revived and set on foot again. And that is divers ways. As first, by a *Codicill* annexed after thereunto; as was resolved between *Betford* and *Barnecot* in the *King's Bench*. Secondly, by adding any thing to the Will, or making a new Executor. Thirdly, by express speech or word that it should stand, or be his Will: as I conceive to have been the better Opinion in the said Case of *Mountagne* and *Jeoffries*; wherein yet was much difference of Opinion, both touching

*M. 38. 29
Eliz. in Ba.
reg.*

Revocation, and new Publication. If a man, having made a former Will, do make
 44 *Aff. p. 36.* a latter, which is more then a bare Revocation; yet if afterward, lying upon his death-bed and speechless, both these Wills be delivered into his hand, and he required to deliver to one of his Friends about him that Will which he would have to stand, and to keep in his hands the other, and he thereupon delivereth to the Minister, or other his Neighbours, the first-made Will, retaining in
 44 *Ed. 3. fol. 33.* his hands the latter, as was done in the time of *Edward* the third; here the former Will, though made void many years before by the latter, is revived, and shall stand as the partie's Will. But now put the case that a Bequest at the first is void; yet by Publication after it may be good: as if one give to *Sarah* his Wife a piece of Plate, or other thing, and hath no such Wife at the time, but after marrieth one of that name, and then publisheth his Will again; now this shall be a good Bequest. So if one devise Lands or Goods which one hath not; if he after do purchase the same, and then say, that his Will before made shall stand, or be his Will, it shall be

be a good Will and Bequest; for this, in effect, is a new making. And though most of the precedent Cases be of Revocation of particular parts of the Will, and not of the total; yet first, be it considered, that that part so revoked was, in effect, the substance of the Will; next, it is easily discerned, that if one part be revocable, so is another also. And thus Revocation may spread it self over the whole: Nay doubtless, the whole *uno flatu* may be revoked, as well as by parts; even as a Faggot may be put wholly into the fire, as well as stick by stick. And as the *Velleities* or disposing parts of the Will are revocable and revivable by new Publication, as afore said; so is also the constitution of Executors. As if one of the Executors names be stricken out, and afterwards a *Scet* be written over his head by the Testator or by his appointment, now is he a revived Executor. So if the Testator express by word, in the presence of Witnesses, that the party put out shall yet be Executor. But now I mean, where the Executor's name is not so blotted out but that it may be read and discerned;

3^o 4 P. &
M. Dy. 143.

The Office of

for else the *Stet* is upon nothing: and if the verbal Re-affirmance should renew his Executorship, then must the Will be partly in writing, and partly Nuncupative, his name not being to be found in the written VWill.

CHAP. II.

Of the state of things instantly upon the Testator's Death, before any Will proved.

Here we will consider these several things.

1. *What is wrought by a Gift of a thing certain and known; as the White Horse, the Red Cow, &c.*
2. *What by a Bequest to an Executor.*
3. *What wrought by a Release in the Will to a Debtor.*
4. *What by making a Debtor or Creditor an Executor.*

AS touching the first, *viz.* the Bequest of a Chattel, real or personal, which the

the Testator had in possession: notwithstanding that, if the said Testator had by his Deed or writing, or but by word on his death-bed, or before, given these his goods, and died before they had been taken, he to whom they so were given might have taken them; yet in this case of Gift by Will, neither can the Legatee, *viz.* he to whom they are bequeathed, either take them or recover them from the Executor, or a stranger take them by any Suit at the Law, for that he hath no property in them; yea, if the Bequest be to himself who is made Executor, be it of Lease, Plate, Cattel, &c. they shall not vest nor settle in him as Legatee, but as Executor, untill express or implied election; but he is to have and take the same by way of Legacy. And the reason in both Cases is this, *viz.* That the Law prefers Debts and the satisfaction of them before Legacies, and ties Executors also to that rule; and therefore will transfer nothing from or out of the Executor, till he, having considered of the state of the Debts to be paid, & Goods out of which the same are to be paid, shall find that safely this or that Legacy may take effect without making any defect in payment of Debts, or drawing

I & 2 P. & Ma. Dy. 110. a. & 139. b. Vide Co. 8. f. 95 & 96.

Of the second, see *Co. 10. f. 47. 652.* So resolved *Pas. Trin. 37 El. in b. a. m. onely Gaw. contra Portman Pl. & Simes Def.* See more of this *Tit. Legacy*; and of the assent of one Executor onely.

27 H. 6. 8.
Of late, per-
haps, some
single or
sudden opi-
nions may
also have
run that
way: but in
Portman's
Case the
Point was
divers times
argued, and
then ad-
judged as
before.

To be
bought.

upon him and his own Goods any Damage or loss, as a Waster, and thereupon shall assent to such Legacy. Thus now is the Law taken; but heretofore some Opinion hath run otherwise, *viz.* That he to whom any Bequest was made of a thing known and certain, might take it without any assent of the Executor; and that when to the Executor himself any Goods or Cattel, movable or immovable, was bequeathed, in case there were otherwise sufficient goods for satisfaction of Debts, the same should instantly upon the Testator's death, without any act or election by the Executor, be transferred into and unto him in his own right as a Legacy, and not remain in him as Executor. As for sums of money bequeathed, or so much in Plate or Rings, it is evident that they must be had by the delivery of the Executor: Yet hath the Legatee such an interest before delivery, as that, dying before payment, it will not go to his Executors. But, as I take it, no such person, to whom any thing certain is given by Will, can make any Gift or Grant of it before the Executor have assented to his having thereof: nor, perhaps, will the Executor's assent after the Grant

Grant have such relation as to make good the Grant precedent : Why so yet, *Quere.* of this see more after, which is a like Assent to the Grant of another? And *Quar.* if by the Outlawry of the Legatee before the Executor's Assent this thing bequeathed be forfeited, *Til. Legacy, thereabout.*

If without just cause an Executor will refuse to assent, he is compellable by Law Spiritual, or Court of Conscience : yet if Spiritual Court press to do, where is just cause to stay, a *Prohibit* lieth, *ut credo* ; for since Executors stand liable to recovery of Debts against them by Common Law, it is reason that Law enable them to keep wherewith to pay. And here yet note some seeming opposition in the Law : For where before great difference was shewed between a Devise or Bequest, and a Gift or Alienation executed in one's life-time ; yet the Lord *Dyer* reports it to be resolved, That where a Lease for years was made upon condition that the Lessee should not alien in his life-time, yet a Bequest of this Lease by his Will was a breach of the Condition, as being an Alienation in his life-time.

3. Of a discharge by Will to a Debtor some question may be, whether to per-

perfect and make good this, so as the Debtor may plead it in Bar, there be not requisite, as in the former, an assent of the Executor. On the one side, since this giving is a forgiving, for he to whom it is bequeathed cannot otherwise have it then by way of Retainer, it may probably be said, that here needs no such assent of the Executors, as in the Case where any thing is to be transferred; for here is rather an Extinguishment and an Exoneration, then a passage of a Chattel by way of Donation. On the other side, it is probable that, it being but a Bequest, and so a Legacy, since Debts are in Law and Conscience to be satisfied before any Legacies, therefore the Executor, having not sufficient otherwise to satisfy his Testator's Debts, may sue for this Debt, and refuse to suffer it to pass away as a Legacy. And to this Opinion do I encline as best for Creditors; and satisfaction of Debts is by Law respected as an act greatly concerning the Testator's Soul. But some will, perhaps, make a contrary doubt, that although there be an assent of the Executors to this discharge, yet it will not amount to a Legal Release; for that a Debt, at least if it be by Specialty, cannot

cannot be released but by Deed, and a Will is no Deed; for a Seal is not necessary thereunto, though it be fit and convenient. Whereto I give this answer, that a Will, though it be not properly and legally a Deed, for it may be good enough without a Seal, which is an essential part of a Deed; yet hath it the force and effect of a Deed: for as a Release cannot be made but by Deed; so neither can an Estate or Interest, though but for years, in Tithes, Advowsons, Commons, Fairs, and like things, be granted or assigned otherwise than by Deed: yet it is clear that such a state for years in any of these may be given by Will, as well as a Lease of Land; which proves a Will to have the force and effect of a Deed.

Not *de effe*,
but *de bene*
effe.

*Of making a Debtor or Creditor Executor:
and first of the Debtor made Executor.*

Suppose we then that *A* and *B* being made Executors, the Testator was indebted to *A* twenty pounds, and *B* was indebted to the Testator twenty pounds, how do things stand presently upon death? First, it is clear that the Debt of *B* to

21 H. 7. 31.
Plow. Com.
185. contr.
Danby &
Chake, 8 E.
4. 3.

And may be
granted,
that he
should ac-
count before
the Ordina-
ry for it.

Yet it seems
Flou. 186.
a. the Law
was taken
to be *ut su-
pra. 8 E. 4.*

Though he
never admi-
nister.
21 E. 4. 3.
81. 11 H. 6.
38.

2 R. 3. 20.
per Starkey,
& 22. per
Vavasor.
9 H. 5. 13.
Left a De-
murrer in
Trespas by
all, against
the Execu-
tor, who was
Trespasser.

B to the Testator stands in Law extinct ;
this making of him Executor being a Re-
lease in Law.

Therefore let Creditors take heed of
making their Debtors Executors. And yet
doubtless (methinks) such a Debtor made
Executor should hold himself restrained
in Conscience from taking benefit there-
of, if (the Debt remitted) there shall
want to satisfie either Debt or Legacy of
the Testator. And I doubt whether a
Court of Conscience may not justly so
order, the Testator being perhaps igno-
rant of this point in Law, that this Debt
should be released by making the Debtor
Executor.

And what is spoken of making the
Debtor Executor, generally the same is to
be understood of making any one of the
Debtors Executor, where there be ma-
ny joynt-Debtors : and so where ma-
ny Executors be made, and but one of
them is Debtor to the Testator ; for they
cannot sue without making him who is the
Debtor also a Plaintiff, which he cannot be
against himself. The like Law touching
Actions of Trespas or Account. Yet of
old, where one made his Bayliff one of his
Executors together with *A* and *B*, who
brought

brought an Action of Account against the Bayliff in their two names onely, Justice *Herle* held the Action well brought. This was in the beginning of King *Edward* the third his time; but the contrary hath been since resolved. Some also have held, that though in the life of this Executor who was a Debtor he could not be sued; yet after his death, the surviving Executors might sue his Executor. But that cannot be, as I take it, for that the Debt was utterly extinct by the making of him Executor, as if the Testator had released it to him; yea, though his Executor died before he did ever Administer or prove the Will. And like extinguishment of the Debt, if the Creditor marry with one of the Executors of the Debtor: yet was there an Action of Debt maintained *temp. Ed. 3.* by the Husband and Wife against the Husband and other Executors, upon an Obligation by the Testator to the Wife before her marriage. But if a Debtor take Administration of the goods of his Creditor, this, methinks, should not discharge him, but that his Debt should stand as *Assets* in his hand, because the Intestate did no act to free him from the Debt.

3 E. 3. 23.

6 H. 4. 3.

8 E. 4. 3.

Cook;

21 H. 7. 31.

20 E. 4. 17.

21 E. 4. 3.

61.

Plowd. Com.

36.

Plowd. Com.

185.

11 H. 4.

f. 83, 84.

31 E. 3. Fitz.

Ex. 82.

The Debtee or Creditor made Executor.

Plow. *Com.*
185. By all
the Judges,
but *Brook*
Chief Just.
Plow. 185.b.
where the
goods be of
more value,
which shall
be so alte-
red?

See *Plow.*
Com. 544.
the like of a
Legacy of
20 l. given
to the Exe-
cutor.

Or if the
goods a-
mount in all
to no more
then this
Debt.

THIS making of the Debtee Executor,
and so the party who both should
pay and be paid the Debt, giveth him
clearly power to pay himself before any
other, if his Debt be by Specialty, or up-
on Record. Nay, some have held, that
so much of the goods of the Testator shall
be altered in property out of the Executor,
as Executor, into him as Creditor; but
how that can be I cannot see: For whe-
ther it shall be satisfied out of the Leases
and Chattels, real or personal, whether
out of the Corn in the Barns, Cattel
in the Fields, Plate, or Household-stuff,
this, till some election made by this
Debtee Executor, cannot be known,
nor shall be effected by any operation
of Law preventing the Executor's ele-
ction in taking his satisfaction where
and how he will. For certainly, as an
Executor hath election to pay which
Creditor he will first, so hath he election
to pay and satisfy himself by what
part of the Testator's goods he will;
yet, perhaps, if there be ready money in
the Executor's hands, there shall be an al-
teration

teration of the property of so much thereof as was owing by the Testator to the Executor. And if there come not to the hands of such Executor sufficient to pay himself, he may have an Action of Debt against the other Executors, or the Heir, as by some hath been conceived :

See *Flor.*
Com. 185.
13 H.8.15.
11 H.4.83.
12 H.4.21.
20 E.4.17.
21 E. 4.3.

Yet let it be well advised of, whether, if he do Administer at all, and specially if he pay himself any part, he have not thereby barred or disabled his Suit for the residue. But if he refuse to Administer at all, it were very unreasonable that he should not be able to sue the other Executors : for so a Debtor might by subtilty make his Creditor an Executor with others, and take a course that his goods should come onely into the hands of those others, so as the Creditor could not pay himself; and consequently, if he could not sue the other Executors, he should thus be stripped of his Debt by a sleight.

Flor. 184.b.
& 185. b.
He is barred;
for he cannot ap-
portion his
Debt.

Quar. if he may bring the Action in the name of the other Executors onely, the Will being proved in his name as well as in the names of the rest; or whether the Action shall be brought in his name also, and then he be severed at his own prayer. But against the Heir there is none

12 H. 4. 21.
He may sue
the Heir, if
the Heir be
bound, and
he have not
sufficient
goods as
Executor.

none to join with him ; and him may he sue, if he have not Administred as Executor ; this admitted, that the Bond extend to the Heir, which without expresse words it doth not, though for the Executor it be otherwise.

Thus having considered of the state of things before and without any Will proved, or other act done by Executors ; we should now come to the point of the proof: but two things pertinent to it are in order precedent.

CHAP. III.

1. *What may be done by or to an Executor before proving of the Will.*
2. *Of refusal, and the things incident thereunto.*

Before Probate what may be done by or to Executors.

AS to this, it is clear, that before proving of a Will by the Executor he may seise and take into his hands any of the goods of the Testator ; yea, enter
into

into the house of the Heir (if not locked) so to doe, and to take the Specialties of Debts; and generally he may doe all things which to the Office of an Executor pertain, (except onely bringing of Actions and prosecution of Suits.) He may pay Debts, receive Debts, make Acquittances and Releases of Debts due to the Testator, and take Leases or Acquittances of Debts owing by the Testator: yea, if before such proving the day occur for payment upon Bond made by or to the Testator, payment must be made to or by this Executor, though no Will be proved, upon like pain of forfeiture as if the Will were proved. Also an Executor may before Probate sell or give away any of the goods or catels of the Testator. And whereas the Assent of an Executor is necessary to the settling and execution of a Legacy, as before hath bin shewed; so as if one give me his white Horse or black Cow by Will; or any other well-known thing, I cannot after his death take it, though I come where it is, but am punishable by Action of Trespass at the Executor's Suit, if he do not assent: yet an Executor before the Will proved may give his Assent, and it will stand good. Yea, although

E he

9 E. 4. f. 33.
47. 7 H. 4.
18. They
cannot sue
till they
have the
Will under
the Seal of
the Ordina-
ry.

Wray. 23 El.

22 & 23 E.
Dy. 372.

Dy. in Plow.
Com. 281.
Case of
Greysbrook
and Fox.

he die after any of these acts done, the Will being never proved by him; yet do these Acts so done stand firm and good, as I take it. Yet (as I find) an Executor making his Will, and dying before he hath proved the Will of his Testator, his Executor may not prove both the Wills, and so become Executor to both the Testators. But in case the goods were, after Debts paid, bequeathed to the Executor, his Executor may take Administration of the first Testator's goods with the Will annexed; as by Doctor *Drury* was in the late Queen's time declared to be the Law and course of the Court Spiritual; to which credit was given by the Judges of our Law and the Court of *Star-Chamber*: for though the Book do not mention it to have been in *Star-Chamber*, it is else-where so reported. Yea an Executor, for goods of the Testator taken from him, or a Trespass done upon the Lease-Land, or a Distraint or Impounding of Goods or Cattel, may maintain, before the Will be proved, Actions of Trespass, or Replevin, or Detinue; for these Actions arise upon the Executor's own Possession.

But

But before the proving of a Will, an Executor cannot maintain a Suit or Action of Debt, or the like. And the reason is, for that therein he must shew forth the Will proved under the Seal of the Ordinary. And so, as I take it, must it be if he bring any Action for Trespas done or Goods taken in the Testators life-time; so as the Testator himself was intit'led to the Action, and it grows not upon the Executor's Possession. I find that an Executor granting the next Avoidance of a Church which to him came from the Testator, the Grantee maintained a *Quare impedit*, without shewing forth the Will: But the Executor himself might so have done as of his own Possession before the Will proved, and so without shewing it under the Seal of the Spiritual Court, as well as Actions of Trespas or Replevin, for goods taken after the death of the Testator: yet in the principal Case of *Greysbrook* and *Fox*, which was an Action of Detinue by the Executor for goods taken or detained after the Testator's death, the Plaintiff did shew forth the Will proved. But that proves not any necessity thereof; or that, if the Will had not been

34 P. & M.
Dy. 133. a.
Dy. in Plow.
Com. 281. a.

Plow. Com.
275. b.

proved, it could be no hurt to shew it forth. So upon his own Contract for the Testator's goods : as if the Executor sell Cattel or other goods of the Testator before the Will proved, he may for the money payable maintain an Action for Debt before he have proved any Will: and in this, and the Action of Trespass, there is no necessity of naming him Executor. Also, on the other side, an Executor may well enough be sued for Debts of the Testator before the Will be proved ; for he may not by his own act of delaying the Probate of the Will keep off Suits, except he will refuse in due manner, that so Administration being granted, there may be some body suable by the Testator's Creditors for Debts by him owing. And the usual Plea of the Defendant, to estrange himself from the Testament, is to say, that he neither is Executor, nor hath Administred as Executor. So as if he either be Executor *de jure*, or *de facto*, by his own Act of Administring, it sufficeth.

*Of refusal to prove the Will, and therein of
Administration, fore-closing
Refusal.*

NOW touching this other point fit to be thought of before we meddle with the Probate, *viz.* Refusal to prove; we will thereabout consider these several parts. *viz.* First, how and in what manner Refusal may or must be. Secondly, in what cases or in respect of what Acts one named Executor hath lost or determined his election of Refusal or Acceptance. Thirdly, of what effect and operation the Refusal is; what difference where all the Executors refuse, and where but some or one of them. Fourthly, what Relation it hath.

Now touching the first: the Ordinary, before committing Administration, where a Will is made and Executors named, if he know of it, must send out Process against the Executors, to come in and prove it: and if they do not come, they are to be excommunicate; but if they do come, if they, nor any of them, will prove, by reason of such Refusal the Ordinary may commit Administration: perhaps also they may be appointed Executors at a time future, and not presently.

3 H. 7. 14.

9 Ed. 4. 47.

3 Hen. 7. 14.

Plow. Com.

281.

9 *Ed. 4. 33.*
Sec Pl. 184. a.
 If Debtee
 made Exe-
 cutor sue
 the Ordina-
 ry for the
 Debt, this
 amounts to
 a Refusal of
 the Execu-
 torship.
M. 28 & 29
Eli. imer
Brooker &
Carter, in
ba. com.

9 *Ed. 4. 33.*
 The Book
 calls him
 Cardinal of
 Canterbury.

Now Refusal cannot be verbally, or by word, but it must be by some Act entred or recorded in the Spiritual Court, and therefore must be done before some Judge Spiritual, and not before Neighbours in the Countrey; for that is not effectual. Yet Sir *Ralph Rowlet* making the Lord Keeper *Bacon*, *Catlin* Chief Justice, and the Master of the Rolls, Executors; they wrote a Letter to the Ordinary, that they could not attend the Executorship, and therefore wished him to commit Administration, who did so, making every of their Refusals to be recorded: and this was held good. So as a Lease being by that Will bequeathed to *Catlin*, and he, after this Refusal, entring and assigning it to one, and the Administrator assigning it to another; it came in question between them whether had best right; and Judgement was given for the Assignee of the Administrator against *Catlin's* Assignee: whereas if the Refusal had been void, *Catlin* had continued Executor, and so his Title had been better. For in case the Ordinary himself be made Executor, there (saith the Book) he may refuse before his Commissary: and so was it there pleaded for the Arch-bishop of *Canterbury*, who was made Executor to Sir *Will. Oldballe*.

What

What shall be such a meddling or Administring by an Executor, that he cannot refuse after.

AS to the second, where an Executor hath Administred he cannot afterwards refuse, because he hath already accepted of the Executorship, and so determined his election: at least the Ordinary ought not to accept of such Refusal, but should compell him to take upon him the Executorship, as the Law was taken both in the time of *Ed. 4.* and of *Queen Elizabeth.* Yet if the Ordinary do admit one to refuse, notwithstanding that he have Administred, this standeth good, as it seemeth conceived by the Judges in the time of *Henry 6.* For there the Executor commanded one to take goods of the Testator out of the hands of *J S*, who did accordingly, and afterward the Executor refused before the Ordinary, and Administration was committed to the said *J S*, who brought an Action of Trespass against the party so taking the goods from him; and there

9 *Ed. 4.* 47.
Selling Land
as Executor
is Admin.
Dyer in Case
of *Greys-*
brook & Fox.
Pl. Com.
280. b.
Fas. 7 Eliz.
36 *Hen. 6.*
J. 7. 8.

the Refusal and committing Administration were admitted to be good: so perhaps, *Factum valet quod fieri non debuit.* And it well may be that the Ordinary did not know of the Executor's such intermeddling at the time when he did admit of his Refusal. After Refusal, and Administration committed, the Executor cannot go back to prove the Will and assume the Executorship: but if onely upon the Executor's making Default to come in upon Process to prove the Will, the Administration be committed; here the Executor may yet at any time after come and prove the Will, and so undo the Administration: as was in the late Queen's time resolved between *Bale* and *Baxter*.

Mich. 27,
28 Eliz.

Boxel's Case
in com. Ban.

But what if after Refusal it shall appear to the Ordinary, that the Executor hath Administred before his Refusal, so as had it been then known, the Ordinary should not have admitted him to refuse? whether now may he revoke his Administration, (for it is revokable) and inforce the Executor to proceed to proving of the Will? And surely, methinks he may; for that the Executor by Administring had determined his election, and accepted the office of Executorship:

now

now he cannot both accept and refuse. Besides, we know that Creditors may maintain their Suits against him having once Administred; the Common Plea to free himself, and shew that he is not the party suable for the Testator's Debt, being that he neither is Executor, nor ever did Administer as Executor; wherefore he having Administred, it will be found against him. Now it is not congruous that in the Spiritual Court there should be no Executor, and yet in the Courts of *Westminster* there should be an Executor. But since this point of Administring is so material to the point of being admitted or not admitted to refuse, we will here consider in this place briefly what shall be said to be an Administration by an Executor determining his election, and disabling his Refusal, and what not.

1. Some will, perhaps, conceive, that the act of the Executor in the fore-mention'd Case, where he onely commanded *J S* to take goods of the Testator's out of a stranger's hands, was no Administration; and it is true that in that Book it is passed in silence, and not expressly said to be an Administration. But the *L. Dyer*, in the Case of *Greistbrook* and *Fox*, speaking of that Case,

A being Executor did administer, and yet would not prove the Will. *B* took Administration; and being sued for Debt, did plead the matter *supra*, and it was held a good Plea; and it was found for him before Just. *Dothe-ridge ad Ox.* in a Stat. 2 *Carol. Reg.*

32 H. 6. 7.

20 Ed. 4.
17. & 21
E. 4. 5.

21 Ed. 4. 5.
21 H. 6. 19.
20. 33 H. 6.
31. 8.
1 El. Dy.
166. 13 Ed.
3. Exec. 91.
3. 4 Ma. Dy.
135. 26 H.
8. 7. 8. 20 H.
7. Kelw. 63.
21 Ed. 4. 5.
20 H. 7. j. 5.
4.

Case, saith expressely, that the Ordinary might there have rejected the Executor's Refusal; for, saith he, when the Executor had once intermeddled, he should not have been suffered to refuse: so as he doth clearly admit that to have been an Administration. And elsewhere it is held, That if an Executor take goods of the Testator, and convert them to his own use, this is an Administration; yea, if he do but take them into his hands, say some, without converting of them. If the Wife take more Apparel of her own then is necessary, this is an Administration, as the Book admits: but if by the assent or delivery of the Executor, it is not. More clearly, If one do either pay Debts of the Testator, or receive Debts, or make Acquittances for them, or demand the Testator's Debts as Executor, or give away goods which were the Testator's, or deliver money of the Testator's for Fees about proving the Will; all these be full and clear Administrations as Executor. But, saith *Fitzherbert*, if he onely lay out his own money for Fees, this is no Administration; so saith *Frowick*, if he pay Debts with his own money, and if he doe it about the Funerals. But some difference may

may be between Acts done by one named Executor and by a stranger, viz. to make him an Executor of his own wrong; whereof we shall speak after, not in this place. If one being sued as Executor take it upon him, and plead in Bar as an Executor; this is an Administration.

9 Ed. 14. 2,
13. 33 H. 6.
31. a.

Of the force and effect of Refusal.

AS to the third Point, viz. The force or effect of Refusal; first, it is clear that if there be but one Executor, and he do refuse, or being many, if they do all refuse, then is the party dead Intestate, and Administration is to be committed with the Will annexed, as is before said, nor can any after meddle as Executors. But in case there be divers Executors, viz. A, B, and C, and A onely refuseth, and the Will is proved by the others, there A continueth Executor notwithstanding his Refusal; so as he still may release Debts of the Testator, and Debts owing by the Testator may be released to him: yea, if Suit be to be had by or against the Executors, it shall not be in the name of B and C onely, but A also must be named as a Plaintiff or Defendant,

Cook 1. 5. f.
28. Com. 18.
E. 2. Bro. 8.
37.

22 Ed. 3. 19.
15 Ed. 3.
Exec. 8.
41 Ed. 3. f.
22. 21 Ed. 4.
f. 24.

42 El. Co.9.
fol.36,37.

4 & 5 Pl.
vs M. Dyer
169. c. 6.
Contra 21
E. 4. 23, 24.

pendant, else the Action may be overthrown. For the Will being proved, all the Executors therein named stand and continue Executors, notwithstanding any of their Refusals; as it was resolved in the latter end of the late Queen's time, according to divers former Resolutions. And therefore this Executor which hath refused may afterwards administer at his pleasure, and intermeddle with the goods as well as the others: yet, saith *Brook*, Chief Justice, after the death of his Companion he cannot so doe; but then the Executor of him who proved is onely to administer. *Quod non est Lex*. There may be some difference between Suits by Executors and Suits against Executors: For when they themselves sue, they being privy to the Will and having the custody of it, must bring their Action in the name of all the Executors, according to the Will; but he that is to bring an Action against them need not, perhaps, take notice of more Executors then those that have proved the Will, or otherwise do administer: for it is no good Plea for themselves in an Action against them to say there is another Executor, without saying also that he hath administered, as it seemeth

eth by divers Books. Nay, one Book in the time of *Henry 8.* goeth farther, viz. That if the Suit be brought against all; yet one of them not intermeddling with the proving of the Will may plead that he was never Executor, nor administred as Executor. By this it should seem that Executors refusing, (I mean all of them; so as no Will is proved) they in an Action against them may say that they were never Executors: but, methinks, they should not so plead, but shew the special matter, as was done in the time of *Edward* the fourth.

33 H. 6. 38.
2. Co. 9. 37. 6.
32 H. 6. 25.
27 H. 8. 11.
per totam
Curiam.

As for Relation, I will forbear to speak, till I come to proving; for that Probate and Refusal stand in the same state as touching Relation.

9 Ed. 4. 33.
Co. 9. f. 36.

CHAP. IV.

Of Proving Wills.

NOW let us see touching the Probate of Wills what is considerable; and therein, of these three or four parts:

1. *Where, and before whom, and how, the Proof must be.*

2. *What*

2. *What shall be Bona notabilia, to intitle to Probate.*
3. *What force or validity either a right or erroneous Probate hath.*
4. *What relation either Probate or Refusal hath.*

As touching the first Point, *viz.* How, and where, and before whom, Wills are to be proved, briefly thus :

The proving is in the Spiritual Court : yet in some Mannors, by Prescription, Wills are to be proved before the Steward, though no Lands thereby pass, as appears by divers Books : and in the Mannor of *Mannsfeld* is this Prescription ; and in others, whereof *Tremaile* was Steward in King *Richard* the third his time, as he declared. And the like I may tell of my own knowledge touching the Mannors of *Cowly* and *Caversham* in the County of *Oxford*, where I have kept the Courts for the Lord Vicount *Wallingford*, and found it in present and frequent use. And it is said by the Judges in the time of King *H. 7*, That this proving of Wills in the Court Spiritual is not ancient, but of later time. Yea it is acknowledged by *Linwood*, the Dean of the Arches, that it pertains not to the Spiritual Court of common right ; nor

is

2 R. 3. Fitz.
Co. lib. 9.
fol. 43.

11 H. 7. 12.

is so in use in other Kingdoms. The reason why the Law of *England* hath herein given way to the Ordinary and Court Spiritual, Plowd Com. 279. is said by *Walsh* in *Greysbrook* and *Fox's* Case to be the Piety and Integrity which is presumed to be in those of that Function, having charge of Souls. Indeed they are, as it seems to me, Executors of the New Testament, or last Will and Testament of *Jesus Christ*, whereby great Legacies and Gifts are given to men, and by Pastors to be dispensed and distributed: of which Distributers it is required, as 1 Cor. 4. 2. Acts 20. 27. *St. Paul* saith, *That they be found Faithful*. And happy are they who with him can plead *Plene Administravit*, viz. that they have fully Administred, as he did; much depending thereupon, viz. God's honour, the Blessing, Prosperity and Safety of the Countrey, the Piety, Justice, Conscience, Contentation and Salvation of men. As for Wills proved in *London* and *Oxford* before the Mayor, that is onely in respect of the Burgages within those places devisable; but they were to be proved also before the Ordinaries in respect of the goods, and there onely where no Lands are bequeathed.

The proving then is to be before the
Ordinary

*Vide fol.
proxim.* Of
Bona Notab.
both in
Canterbury
and York*

Ordinary, General, Particular, or Special. By General I mean the Metropolitan or Arch-bishop; before whom it is to be proved; in case the Testator have goods valuable, called *Bona Notabilia*, in divers Diocesses whereof he is Superiour.

Of Bona Notabilia.

WHat shall be said to be *Bona Notabilia* is considerable; for thereabout hath been much diversity of opinion: Some holding that they must be of forty shillings value, some five pound, some ten pound; yea, some, that the value of a peny sufficeth to draw it to the Arch-bishop from the particular Bishop. But that difference of opinion I conceive to be now cleared by a Canon made in the first year of King *Charles* his Reign at a Convocation then held, whereby it is established, that five pound shall be the sum or value of *Bona Notabilia*; yet therein is this *Proviso*, that whereby Composition or Custom in any Diocesses *Bona Notabilia* are rated at any greater sum, the same shall continue not altered. It is likewise thereby provided, that if any man die *in Itinere*, viz. in his Jour-

Canon 92,
93.

Journey or travel, the goods which he then hath about him shall not cause that Administration shall be committed, or the Will proved before the Metropolitan.

Having considered of the value, now another Point observable is, what things shall be said to be *Bona Notabilia*. And as to that, Debts owing to the Testator are *Bona Notabilia* as well as Goods in possession, their value being answerable: yet, I think, if the Penal Sum of the Bond be but five pound for payment of a less Sum, although the Bond be forfeited, yet in the Spiritual Court, where respect to Conscience suppresseth the favouring of Executors, this will not be taken to be *Bona Notabilia*, viz. of five pound value, although in Law the whole Penal Sum be a duty. But if the Debt be five pound or more, though it be desperate, or due from the King, against whom no Suit can be, but onely by Petition, yet this will stand for and as *Bona Notabilia*, as I take it, in the Court Spiritual; though thereabout I can but conjecture, since the Rules of our Law determine it not. And this Point, touching the King's being Debtor, I find debated

21 Eliz.

Goods con-
siderable, or
conspicu-
ous.

Hil. 17 Eliz.
M. Com. Da.
Vide 13 and
14 Eliz. Dy.
305.

ted in the late Queen's time, but not resolved, so far as I find. But there *Popham* at the Bar urged that no Debt should be *Bona Notabilia*; and if it should, yet not such for which no remedy by Suit, as in that Case, the Queen being Debtor. Yet a farther Question Local is touching these Debts or things in Action, in what Place or Diocess they shall be said to be as *Bona Notabilia*, viz. whether in the place where the Debtors be, or where the Obligations or other Specialties be. And as to this, the Law hath been taken, That because the persons of the Debtors be moveable, passant and transitory; therefore these Debts shall be said to be and to make *Bona Notabilia* where the Bonds or other Specialties be, and not where the Debtors inhabit and dwell. And so was it not long since conceived by Justice *Walmsley* and Justice *Beaumont* in one *Pretymans*'s Case, no other contradicting it. Herein therefore many are mistaken, who onely in respect that the persons of the Debtors do dwell in forein Diocesses, other then the places of the death of the Testator, or where his other goods were, do take Administration in the Prerogative Court, though the Specialties remained

ned where the party died, or his goods residue were. But in case the Debts be onely by Contract, without Specialty, then indeed they are to be esteemed *Bona Notabilia* there and in that place where the Debtor is, as the said Judges well conceived the difference. But in case Land be given to Executors for payment of Debts or Legacies, this shall not be *Bona Notabilia*, as I take it, though it be *Assets*.

*Of the validity and invalidity of
Probates.*

AS to the third Point, we will first see of what validity an erroneous Proof is, and thereabout we shall find this difference. Admitting that one hath not *Bona Notabilia* in divers Diocesses, so as of right the proving of the Will appertaineth not to the Metropolitan, and yet the Will is proved before him; this is not meerly void, but stands in force till it be reversed by some Sentence upon Appeal; as was resolved between *Vear* and *Jeoffries*, in the late Queen's time. But on the other side, in case one have *Bona Notabilia* in divers Diocesses, or a Peculiar and a Diocess, and yet the Will is

22 Eliz.

proved before the particular Bishop within whose Diocess part of the Goods are; this is meerly and utterly void, without any Reversal. So also of proving in some Peculiar. And in case one have *Bona Notabilia* both in the Diocess of *Canterbury* and in the Diocess of *York*; the Will must be proved either before both Metropolitans, if within each of their Jurisdictions there be *Bona Notabilia*, in divers Diocesses; or else, as I take it, if there so be not in any of the places, then before the particular Bishops in those several Diocesses where the goods are. Or, if within the one Jurisdiction Metropolitan the Testator had goods in divers Diocesses, and in the other but in one Diocess; then in the one place is the Will to be proved before the Arch-bishop, and in the other place before the particular Bishop, as I conceive. And so also of peculiar Jurisdictions. And in some places Arch-deacons have peculiar, or Jurisdiction ordinary, and power to take Probates of Wills, and grant Administrations. But where any like error or misproving is in these respects, it is cause of Reversal or of Nullity, according to the former difference: so also if there be falsehood

hood in the proof, were it *communi forma*, that is, without Witnesses, or by examination of Witnesses; yet may it in the Spiritual Court be undone, if either disproof can be made, or proof of Revocation of that Will once made, or of the making of a latter.

Now, admitting the Will true and right, and also rightly proved; let us yet see the force and strength of the Proof or Will so proved. It being under the Seal of the Ordinary cannot be denied, saith one Book, to wit, whether this shewed forth be a Will proved or not; no, though the Proof be but indorsed on the back, *viz.* that it is so proved, saith the Book. But notwithstanding the Defendant so sued may deny that the Plaintiff is Executor, as not being concluded nor estopped by the Probate so to say. And the reason is, because the Seal of the Ordinary is but matter in Fact, and not matter of Record: nor are the Sentences of Divorce and the like, in the Spiritual Court, Judgments or matters of Record, as hath been often held.

9 Ed. 4. 47.
22 Ed. 4. 50.
22 H. 6. 52.

Plowd. Com.
282. 44 Ed.
3. 32. 19
Aff. p. 2.

Of the Relation of Probate and Refusal.

Plow. Com.
281, 283.

18 H. 6. 12.
2. 9 E. 4. 33.
47. Nor to
make good
a Release
made be-
fore.

Co. hb. 5. 18.

AS for this last Point, both the Proving and the Refusal shall have Relation to the death of the Testator, as I take it, to divers purposes. So as to the Proving, saith the L. Dyer expressly and confidently in *Greislrook* and *Fox's Case*; and the resolution also of the Case proves it. For there Administration being committed before any Will proved or notified to the Ordinary, as it should seem, the Administrator sold some of the goods to *J S*, and after the Executors (proving the Will) brought an Action of *Detinue* for those goods against *J S*, who pleaded this Administration and Sale: and thereupon the Executor demurred; and Judgment was given for him, as having by the proving of the Will disproved the Administration *ab initio*. But it is true that Judgment was given onely by two Judges; one being absent, and the other dissenting in opinion: yet I think it was right and according to Law, and that Refusal shall have the like relation; else could not the Administration relate to the death of the Intestate, as it doth to some

pur-

purposes, expressed in divers Books, viz.
to have an Action of Trespafs for goods ^{39 H.6. 8.}
taken before Administration committed, ^{2 Ma.Dyer}
and to have a Rent growing payable in ^{110.}
that mean time, &c.

What Fees to be paid upon Probate, or
for Copies of Wills or Inventories.

Per Stat. 21 Hen. 8. Cap. 5.

1. *Where the goods amount not to above five pound, onely six pence to the Scribe.*
2. *Where they be above five pound, but under forty pound, 2 s. 6 d. to the BB. 12 d. to the Scribe.*
3. *Where above forty pound, to be taken but 2 s. 6 d. to the BB. 2 s. 6 d. to the Scribe, or 1 d. for each ten lines of ten inches long, at the Scribe's choice.*

THese Sums are to satisfie both for
Proving, Registring, Sealing, Wri-
ting, Praising, making of Inventories, gi-
ving Acquittances, Fines, and all other
things concerning the same.

Where Land is given to be sold, neither
F 4 the

the money raised nor the profits thereof shall be accounted as any of the Testator's Goods or Chattels, saith the Statute.

Note, that the Will is to be brought with Wax thereunto ready to be sealed, and proof to be made of the Will, according to common Custom.

For making the Inventory, the Executor is to take or call to him two Creditors or Legatees of the Testator, and doe it in their presence; or, in their absence or refusal, two honest persons, being the next of his kin; or, in their default, two other honest persons.

The Inventory is to be indented, and one part left with the Ordinary, and the other to remain with the Executor.

The Executor is to make Oath for the truth of it.

For a Copy desired by any, either of a Will or Inventory, no more is to be paid then before is allowed: for the Registering, with the like election to the Scribe or Register, as is above said.

Mr. *Swinborn* saith, That an Executor is to swear, and, if it should be thought fit, to be bound to make a true Account, when he shall be thereunto lawfully called by the

the Ordinary. Of this Account see in page 274. And of Accounting some Books of the Common Law make mention, as 13 *Edw.* the third, *Fitzherbert Exec.* 91. Where *Trew* saith, that of a thing in Action no Account shall be before the Ordinary; but *Parn* seems of a contrary opinion. And elsewhere it is said, that where a Debtor is made Executor to the Debtee, he shall yet account before the Ordinary for this Debt: yea, as of money in possession, saith one; which others denied.

An Executor by wrong shall be drawn to account before the Ordinary, saith *Moyle* Justice. But saith *S. German*, he may not force any to account against the Order of the Common Law; (not shewing what that is.) And *temp. Edw.* the 4. it is said, at least by the Reporter, that after the Will proved, the Ordinary hath no more to doe: *quod non credo.*

Also of the Oath of an Executor divers Books tell, but not to such purpose as *Swinb.* but truly to perform the Will.

See also 31
E. 3. cap. 11.
An Administrator shall
account as
an Executor,
Fitz. Ex. 91.
c. 837. viz.
18 E. 2. Tit.
Brief.
48 E. 3. 14,
15. Of a duty
resting in
account it is
said, the Le-
gatee shall
have remedy
by Account in
the Spiritual
Court.
18 E. 4. f. 3.
Moyle.
4 H. 7. 15.
per Wood.
9 E. 4. 47.
Doct. & Stu.
78. b.
21 E. 4. 22.
Plowd. Com.
544. 4 H. 7.
16. Kelw.
Rep. 64. a.

 CHAP. V.

What things shall come unto Executors, and be Affets in their hands, and what not.

THE things which shall come to Executors are of great multiplicity, and would make a large and confused heap if tied together in one bundle or lump. I will therefore divide and sort them out in parts, after the best manner I can. First, we will divide them into things Possessory, or actually in the Testator ; and things in Action, or not actually in the Testator. Secondly, the Possessory into Chattels, real, and personal ; or (as some less properly exprefs it) movable, and immovable.

Of Chattels real possessory.

THEse may be divided into two kinds, viz. living, and not living. The living are not many and various. 1. The Wardship of the body of another (be it by reason of a Tenure of the present Owner, or by Assignment from the King or other Lord of whom the Tenure was) is a Chat-

a Chattel real, not personal, though it be an interest in the person of another; but it is in respect of a Tenure of Land or other Hereditament, and is for years, *viz.* during the Minority, or till Marriage had, and so is real. Next, a Villain for years (as by Grant for a term from him that had the Inheritance) is a Chattel real. As for an Apprentice for years, it is by Custom, as I take it, that he goeth or is derived to Executors: But, for reason after shewed, I think this Interest be not in the reality, but in the personality rather. So of a Debtor in Execution for Debt, the Interest in him, or perhaps more properly in his Liberty, is not, as I conceive, (for reasons which after I shall express) a real, but a personal Chattel. The like Law of a Prisoner taken in Wars. As for Fishes in a Pond, Conies in a Warren, Deer in a Park, Pigeons in a Dove-house, where the Testator had the Inheritance, or but for life, in the Pond, Warren, Park and Dove-house, they are not Chattels at all, nor to go to the Executors, but to the Heir, with the Inheritance. If the Testator were but a Termor, they are to go to the Executor but as accessory Chattels, following the state of

of their principal, *viz.* the Warren, Park, Dove-house, Pond, &c.

The real Chattels not living are either in Houses or Lands most usually, and that three ways. First, by Lease for years. Secondly, by Wardship of Lands held by Knight's-Service. Thirdly, by Extent upon Judgments, Statutes, or Recognizances; or in things issuing out of Houses or Lands, as Rents, Commons, Estovers, or such like. But where an Inheritor reserves a Rent upon a Lease for years, this shall not go to the Executor, but to the Heir, with the Reversion, other then Arrerages of it behind at the death of the Testator. Also Commons, Corodies for years, Advowsons, Tithes, Fairs, Markets, Profits of Leets, and such like, which the Testator had for years, all which may accrue any of these ways as the first, are Chattels real. Yea, one simple Presentation to a Church, upon the next Avoidance is a real, and not personal, Chattel, before it come to be void; and what then it is we shall after shew. And the title accrued to the Crown upon Attainder of Felony, where the party held not of the King, *viz.* the *Annum, Diem & Vastum*, that is,

is, power not onely to take the profits for a year, but to waste and demolish Houses, and to extirpate and eradicate Trees and Woods, is but a Chattel; and therefore though granted to one and his Heirs by the King, yet shall go to the Executor, and not to the Heir.

Temp. E. 1.
Assize 124.
Fitz.

Some doubtfull or less clear Cases touching Chattels real.

First, where we speak of Wardship, it is not to be understood of Wardship by reason of Soccage tenure, for that goeth not to the Executor, but he shall be next Guardian who now after the death of the first Guardian shall be next of kin, if the Ward continue under fourteen years old; else he is out of Wardship. Secondly, if one have a Lease for three lives to him and his Assignes, this is no Chattel, nor shall go to the Executor, nor to the Heir, but to him who first enters and claims it as an Occupant, if no Assignment be in the life of the Lessee made: Contrarily of a Lease for many years, if three, or more or lesse, so long live, this is a Chattel, and shall go to the Executor. So an Extent upon

37 Ass. p. 11.

4 E.3. Aff.
166. Bro.
Chat. 15.

upon a Statute, yet it is delivered to the party as a Free-hold, *viz. ut liberum tenementum*; but that onely makes it to be *quasi liberum tenementum* as to the maintaining of an Assise, if wrongfully put out. Where one is seised in the right of his Wife of Land or other Hereditament, and is attainted of Treason or Felony, the profit thereof accruing unto the Crown is but a Chattel; and though the King grant it to one and his Heirs, yet it shall go to his Executors. And if one having a Lease for many years, *viz. 100, 500, or more or less*, doth devise and bequeath the same to *A* and the Heirs-males of his body, and for want of such Issue to *B* and the Heirs-males of his body, and dieth, having Issue a Son; the Term shall not go to his Son, but to his Executor or Administrator; for it cannot be made a matter of Inheritance. So if *A* had died without Issue Male, the Term should not have gone or remained to *B*, but to the Executor or Administrator of *A*; as was lately adjudged in the Exchequer between Sir Robert Lenknor and Mrs. Hammond. So of an Advowson, or any other Hereditament, granted or devised to one and his Heirs.

for

for 100 years : or if such a Termer grant a Rent out of the Land to *A* and his Heirs, or the Heirs or Heirs-males of his body ; yet shall the same go to the Executor , and not to any Heir ; for it being derived out of a Chattel , cannot be any Free-hold or Inheritance, but is it self a meer Chattel. *Partus sequitur ventrem.*

39 E.3.37.
So *Man-wood*, if granted for life, it is but a Chattel.
Plow. Com.
524.

Of Chattels personal.

PERSONAL Chattels, or goods moveable, are also in like manner to be divided into quick or dead. The quick are Cattel of all kinds ; as Sheep, Horses, Kine, Bullocks, Swine, Goats, Geese, Ducks , Poultry, &c. There may be also in living Creatures reasonable an Interest as in a Chattel personal ; as in the person of a man taken in Execution for Debt. And this I hold to be in nature not a real , but a personal Chattel, (as before was touched) for that Debt is the root of it , and the body is but a pledge or gage , dischargeable instantly upon Payment , Release , or other Discharge of the Debt. Like Law of a Prisoner taken in the Wars ; for thereof and there-

No. na. br.
88. Reg. c.
rig. f. 102.
There is
mentioned,
that the pri-
soner was to
have 159 l.
for his ran-
som. Bro. no.
ea. 295. &
tit. Property
28.

1 H. 6. c. 5.

therein, as in a Chattel, hath the party a legal interest: as appears by a Writ of Trespass in that Register for taking away a Prisoner, viz. *Quare quendam Scotum Prisonarium suum cepit, &c.* And more lately, viz. in the time of King Hen. the 8th, the King himself, upon the winning of Bullen, bought divers Prisoners of his Subjects. And by a Statute in the beginning of Hen. the 6. his time this Interest in a Prisoner is mentioned as valuable, and coming from one King unto another; therefore, doubtless, shall go from Testator to Executor by death, and not to be infranchised or freed thereby. The interest which one hath in an Apprentice I take to be rather personal than real, though for years, because not springing out of any real Root, as Wardship and Villainage do, but out of a meer Contract. As for a Servant whose Master is dead, doubtless he is legally discharged, and is not Servant either to Heir or Executor: but meet and honest it is that one of them continue him in service, till a fit time of providing for him a new Master; and fit for him, not to depart suddenly.

Now for things personal without life,
these

these are evident, viz. all Household-stuff, Implements and Utensils, Money, Plate, Jewels, Corn, Pulse, Hay, Wood felled and severed from the ground, Wares, Merchandize, Carts, Plows, Coaches, Saddles, and such like moveable things.

More doubtful Cases touching things Personal.

FIRST touching things living. If the Testator had any tame Pigeons, or Deer, or Conies, or Pheasants, or Partridges; these, as well as Chickens, shall go to the Executors: so, though not tame, if they were taken and kept alive in any Room, Cage, or like Receptracle, as Pheasants and Partridges often be; so Fish in a Trunk, as also young Pigeons, though not tame, being in the Dove-house, not able to fly out; yet their Dams, the old ones, shall go to the Heir with the Dove-house. And if the Testator had any reclaimed Hawks, they also as Chat-tels personal shall go to the Executor, because they are things commonly vendible. And whereas Hounds, Grey-hounds, and Spaniels be not so commonly bought and sold, nor so anciently have been; yet are they now grown to be

10 E. 4. 14.
15. Come of
wild ones.
22 H. 7.
Kelw. Rep. f.
88. 118. Co.
1. l. ii. f. 50.
18 H. 8. 2.

10 E. 4. 14.
15. and 18.
So of young
Hawks in
the nest. It
is Felony to
steal these;
ergo, they be
goods.

So an Hunter's Horn, a Faulkoner's Lure.

Hares, Deer, Pheasants, Partridges, wild Ducks, &c. are good meat.

a Merchandise, and why not ? for although they be for the most part but things of pleasure, that hindereth not but they may be valuable, as well as Instruments of Musick, both tending to delight and exhilarate the spirits ; a cry of Hounds hath, to my sense, more spirit and vivacity then any other Musick. Add hereto, that there may be some profit and advantage gotten by them, both *quoad adeptionem boni, & ademptionem mali*, the getting of some good food, and the preserving of others, as Lambs, Conies, Fish, Poultry, by killing Foxes, wild Cats, and others, which destroy them. And we know that money is recoverable in Damages for taking away such, or a Mastiff serving to keep an house ; so of Ferrets, to catch Conies, &c. Therefore they are valuable. But it may, perhaps, be objected, that none of these above are Cattel, and therefore not replevisable, consequently, no property in them ; for when more then one living Cattel is distrained, the Replevin is to be by the name of *Averia*, signifying Cattel. For answer, not to insist that one may have property in divers things whereof no Replevin lieth, as Corn or Hay not in Sacks nor Carts,

Carts, Money not shut in bag nor box, &c. I farther say, that even the word *Averia* may be applied to these: for so I find to Hens and Capons in the Book of Entries, viz. in the Writ of *Curia claudenda*, where the Plaintiff complains of the Defendant's not making his Mounds, *per quod Averia ipsius A*, viz. *Capones, Gallina, & alia Averia ipsius A*, that is, whereby his Cattel, viz. Capons and Hens, and other his Cattel, came into the Plaintiff's house and garden to his damage, &c. And both *Newport* and *Newdigate* hold that a Writ of *Replevin* lieth of such things. Though *Brudenel* were of contrary opinion, yet he also held an Action of *Trespas* maintainable for taking of them, and therefore admitted a valuable property in them. Now come we to things without life; and first, to those abroad in the fields. Put the case that a man dies in *July* (before Harvest I mean) seized for life, or in Fee or Tail, in his own right or his wife's, or estated for years of Land in the right of his Wife being sown with Corn or any manner of Grain, the common saying is, *Quicquid plantatur solo, solo cedit*: yet this shall go to the Executor of the Husband, and not to the Wife or Heir, who shall

Fol. 142.

Hen. 8. f. 3.

Roots of
Carrots,
Parsnips,
Land sown
whereon is
ripe Corn.

For he was
Tenant for
life in effect.

have the Land, but Hay growing, *viz.* Grasse ready to be cut down, Apples, Pears, and other Fruit upon the Trees, shall go to the Wife; as also if they had been upon a man's own Land of Inheritance, they should go to the Heir, though the Corn should go to the Executor. The reason of difference is, because this latter comes not meerly from the Soil without the industry and manurance of man, as the other do: and I take Hops, though not sown, if planted, and Saffron and Hemp, because sown, to pertain as Corn to the Executor. All those yet shall pass to one to whom the Land is sold or conveyed, if not excepted, though never so near reaping, felling, or gathering. But what if the Wife had the Lease for years, as Executor to some former Husband or other Friend, and the Husband after sowing dies? who then shall have the Corn? Certainly the Corn shall go to the Executor of the last Husband, at least so much as is more then the year's value of the Land, or the making it up by addition of other things; for the value is to be *Assets* for payment of Debts and Legacies. Put the case again, that the Husband and Wife were joynt-tenants of the Land; then

then the very Corn growing shall survive to her together with the Land; and though the Husband sowed it, yet shall it not go to his Executor. Being in consideration of things growing on the ground, let us not forget to think of Trees sold by *J S* seised of the Inheritance of the Land to *J D*, who dieth before felling; this Interest is a Chattel, which shall go to the Executor, and not to the Heir of *J D*: but some colour may be that these, because fixed to the Soil and Free-hold, are real Chattels, as the interest in Land is, and not personal. So also of Trees excepted by him who selleth the Inheritance of the Land. But in both Cases I conceive this Interest to be personal, and not real; for that, as it is a propriety of Chattel in the Vendee or Vendor with exception, it stands in consideration severed and abstracted from the Soil or Ground where the Trees grow, though the Trees be not actually severed by the Axe from their Mother Earth. But if the Lessor for years or life do except the Trees, these continue parcel of the Free-hold and Inheritance. And after Corn reaped, and before Tithe set out, the Inheritor of the Tithe dying, I think the

The Wife
also shall
have convenient
apparel. 33 H.6.
31. 2 Eliz.
Dyer.

Co. li. i. f. 48.

Executor, and not the Heir, shall have the Tithe after set out.

Of Houses,
or things a-
bout the
House, 42 E.
3. 6.

Now let us come home to the Testator's House, and see in and about it. Some doubt what pertains to the Heir, and what to the Executor. Question hath been of old, and of late, touching Coppers, Leads, Furnaces, Fats for Dyers or Brewers, Pales, Rails, Glasse in Windows, Tables, Dormants, Wainscots, Doors, Locks, Keys, and such like, to whom these should go, whether to the Heir or Executors. And in the latter end of *Henry* the seventh his time, an Executor taking a Furnace which was set in the middle of a house, and not fixed to any Wall, the Heir brought an Action of Trespass against him for so doing; and it was adjudged for the Heir, *viz.* that this was to go as part of the Free-hold and Inheritance to the Heir. And long before, in *Edward* the third his time, it was debated, whether it were Waste in a Lessee to remove or take away a Furnace, or not: But I find no opinion delivered by the Judges. But in the late *Queen's* time, Justice *Walmesly* said that the Lord *Dorset's* opinion was, that where the Furnace is not fixed to the Wall,

Wall, the Lessee might within his Term take it away. Contrarily, if it were fixed to the Wall; for then it strengthneth the house. And yet, notwithstanding it might be in the one Case so removed by the Lessee, yet it is not there, as he said, a Chattel personal or moveable, so as it is attachable. And there the Case being, that a Clothier, being a Termor of an house, had fixed a Copper to the Wall, with Looms and Pricks necessary for his Occupation; a Judgment being had against him, the Sheriff delivered the Copper in Execution as a Chattel, and after the Lessee took it up, and it was taken from him by virtue of the Execution: whereupon he brought an Action of Trespass, and by all the Judges the Action was maintainable. And whereas it was found by the Jury, that by the Custom of *Kent* the Lessee might remove such a Copper; Justice *Beaumont* said, that without any Custome a Lessee might so doe at any time during his Term. But it is to be noted in the said Case, that the Furnace was by it self delivered as a movable Chattel, and not as part of the house; for that was not meddled withall, nor at all delivered in Extent, (as

*H. 37. Eliz.
Austin's
Case.*

in the Case between *Miles* and *Prat*, where both House and Copper were delivered upon a Statute) the House belike being held upon such a rack-rent, as that the party did not desire to have it, for he might have had the whole being a Chattel, and so have used the Copper during the term. And as touching all other fixed things, the Law was taken in the said case in *H. 7.* his time to be all one as in the case of the Furnace, *viz.* that they should go to the Heir; save onely that for Glass in the windows, *Pollard* said it was otherwise, *viz.* that that should go to the Executors, which none there denied. But since, in the late Queen's time, it was otherwise resolved touching Glass, that it should not go to the Executors, and the like was there said touching Wainscots, and so also by the Lord *Anderson* in the said case of *Astin*. And touching Posts fixed, for that they be parcel of the Free-hold, so also of Mill-stones, Anvils, Doors, Keys, Windows, none of these be Chattels, but parcel of the Free-hold, or thereto pertaining, therefore not the Executor's.

Co. lib. 4. fo.
93, 94.

Things in
Gardens.

Now to come to Gardens also: whereas I before laid down a difference
be-

betwixt things sowed, or not arising from the Earth without manuring, and such as grow of themselves; it will thence be concluded that the Roots of Carrots, Parsnips, Turnips, Skerrets, and such like, coming and arising from yearly sowing, must go to the Executor, and not to the Heir; the case being so, that the Gardner and Sower had the Inheritance of the Garden or Soil. Now though in most places this can rarely be a question of value, yet about *London* and some great Towns it may, and therefore is not unworthy of a line or two, a thought or two, the rather, for that the reason of this case may give light touching right in other cases. And, in my opinion, these (notwithstanding there is a sowing and manurance to generate them and cause their being) shall go to the Heir, and not to the Executor. My reason is, for that the thing of profit is the Root which is hidden in the ground, and I hold it no reason, nor agreeable to Law, that the Executor should dig and break the soil and ground to search for her entralls: he is to content himself with that which is above ground, as Melons of all kinds, and the like, whose fruit is above the ground; but

as

as for Artichokes, though the fruit be above the ground, yet I think they have not such yearly setting or manurance as should sever them in interest from the Soil, therefore they shall go with it to the Heir.

Let us now consider of things, though not fixed to, yet usually kept in houses, *viz.* Writings and Evidences, whereabout generally no doubt can be, but that they follow the interest of the Land: so as if they touch Inheritance, they pertain to the Heir; if but Terms of years, Goods, Chattels, or Debts, they pertain to the Executor: yea so do Statutes and Bonds in Law, (howsoever otherwise in equity) though they concern the assurance and enjoying of Inheritance purchased. What if *A* mortgage the Inheritance of Lands to *B*, upon condition of redemption by payment of five hundred pound to *B*, his Heir, or Executor, and *B* dieth, the Deeds being delivered into his hands? now the Heir, not the Executor, shall have them: for though the money may be payd to the Executor, yet (mean-time) the Land descends to the Heir, nor is there any Debt to the Executor, for *A* may chuse to pay, or not. Put it
on

on the other side, that the Land had been
 sold for five hundred pound not paid to
A, but a Condition, that if not paid to
 him, his Heir or Executor, by such a day,
 then to re-enter; and *A* dieth: here is a
 Debt to the Executor, and no Land de-
 scended to the Heir of *A*, yet shall the
 Heir have the Deeds, for that a Condi-
 tion is descended to him. Question hath
 been touching Boxes and Chests wherein
 the Evidences concerning Inheritance
 are: and although the better opinion in
 our Books doth pitch upon this diffe-
 rence, that where they are sealed up,
 they shall pertain to the Heir, other-
 wise, where not sealed; I cannot con-
 ceive that difference to be grounded on
 good reason, but rather think that Boxes,
 which have their very creation to be the
 houses or habitations of Deeds, should,
 as appurtenant to them, go to the
 Heir, whether sealed or not. On the
 other side, Chests made for other uses,
viz. the keeping of Napery or Ap-
 parel, shall not, as I conceive, be taken
 as appurtenant to Evidences because some
 be in them, for so may other things also
 be: Nor as touching them can sealing be
 of any effect, but rather locking and not
 locking

41 E.3.2.
 36 H.6.26.
 18 Ed.3.4.
 3 H.7.13.

Que. If sole
 use that way
 make a dif-
 ference or
 not.

locking must make the difference touching them, if any difference by inclosure.

CHAP. VI.

Of things not actually in the Testator, but accruing to the Executors by or after the Testator's death.

THESE be of divers sorts : the first and chief whereof are things gotten and acquired by Action or Suit ; secondly, by Condition or Covenant without Suit ; thirdly, by Remainder.

Of things in Action.

TO speak first of the first, it is clear that Debts due to the Testator, be it by Bond, Statute, or Judgement, or for Arrerages of Rent, are not *Assets* to charge the Executor untill receipt of them : and it is clear that the Action to recover these doth pertain to the Executor, and that the Debt and damages recovered shall be *Assets* to charge the Executor. So also of Actions of *Detinue* and
of

of Covenant for any thing personal, or any Chattel real, Lease, Wardship, or the like. But perhaps some will doubt of Covenant touching Inheritance, viz. the assurance of Lands, or enjoying thereof free from this or that incumbrance, or the like: Yet even in those cases, if the Covenant were broken in the Testator's life-time, I think clearly the Action is accrued to the Executor, for that his Testator was to recover dammages in the Action of Covenant for that breach; and he being intituled to these dammages as principal, and not any accessory thing in that Action, the Law hath cast that Action upon the Executor. And that is the cause why, if Waste be committed in the life of the Lessor by his Lessee, and then the Lessor dieth, his Heir can have no Action for this Waste, viz. because he cannot recover the treble damage; so neither can the Executor have it, for that he cannot recover *locum vastatum*, the place wasted, the Inheritance whereof is in the Heir.

A Church of the Testat. Inher. become void in his life comes to the Exec. as a thing in Action; but is not *Affects*, for not vendible.

That the Executor at the Common Law could not maintain an Action of Trespass for goods of his Testator taken away in his life-time, seems to be implied by the Statute in the time of K. Edward

II H.4.32.
45 E. 3. 3.
No. na. br. 59.
4 E. 3. c. 7.

the

And the like
given to
Executors of
Executors
per Stat. 25.
E. 3. c. 5.
17 E. 3. Fit.
106.

c. 21. meant,
ut credo.
21 H. 6. 1.
But Mark-
ham è con-
tra.

21 H. 8. c. 19.
4 E. 3.

the third, which gives such Action. Yet on c
it seems that a Replevin was maintain- that
able by the Executor, at least in some ca- Ten
ses, for goods taken or distrained in the Sta
Testator's life-time. But in case the Di- ker
stress were for Rent or Service, it is said mo
a little after the making of that Statute, ing
that the Lord may not now avow for his to v
Rent or Service, because his Tenant is rel
dead, but must set forth the matter, and the
thereupon justifie to excuse himself from sai
answering damages ; and the Executor Bu
shall by this Action recover the Cartel fo
or Goods, and that by the Common Law, th
saith the Book , though the Statute of g
Marlebridge had never been made , for w
that the propriety remained in the Testa th
tor. Note , it speaks not at all of the F
said Statute of 4 Edward the third. But t
But *Newton* in the time of King *Henry* the 6. C
would have it, that the Executor in that I
case should not have a Replevin, but an l
Action of Trespass grounded upon the c
said Statute, viz. 4 Edw. 3. which me-
thinks cannot be by any means , by rea-
son of the Statute of *Marlebridge*, cap. 3.
Non ideo puniatur dominus, &c. for the
Executor, as well as his Testator, is there-
by restrained, as I think, from the Acti-

Yet on of Trespafs against the Lord. As for
 that no Avowry can be made upon the
 Tenant, that is now remedied by a late
 Statute. The other Statute hath been ta-
 ken to extend to other things then goods
 moveable : for where a Church becom-
 ing void, a stranger presented thereun-
 to wrongfully, and the Patron died; it was
 resolved in the late Queen's time, that
 the Executor might by the equity of the
 said Statute maintain a *Quare impedit*.
 But whether an Action of Trespafs lieth
 for an Executor against him who spoiled
 the Testator's Corn, Grasse, or Wood
 growing, hath been questioned, but no-
 where resolved to my knowledge. I
 think it may lie with some difference.
 First, for that the Statute of 4 Edward
 the third doth not onely speak of
 Goods carried away, as limiting the
 Law to that Trespafs solely and particu-
 larly, but speaks generally of Trespafs
 done to Testators; and then brings in
 that particular of goods, as one Instance.
 Now there be many Cases of instances
 or ensamples given in Acts of Parlia-
 ment, which yet do not restrain the
 remedy or Purview to that particular, or
 from extending to other Cases of like na-
 ture.

The B. of
 Cover. & L.]
 and Sale's
 Case M. 32
 & 33 Eli. in
 com. ba. So of
 Ravish-
 ment. Fl.
 gard. 7 H. 4.
 2. & 7 H. 4.
 6. Eject.
 Firm. & Tild.
 De clauso
 fratto
 meerly it li-
 eth nec.
 11 H. 4. 3.
 This Periam
 Just. did ve-
 ry judici-
 ously urge in
 Salt's Case
 supra.

ture. Thirdly, the Stat. speaks of Trespass remaining unpunished, which it meant to redresse: But it should still leave many unpunished, if it should have no large extent then to that one singular Trespass of Goods taken away, viz. moveables. Again, the Testator was clearly intituled to a recovery of damages for this other Trespass, which if he had recovered, should have come to his Executor: Yea, the things themselves, all, if felled in the Testator's life, and part though not felled, should have come to the Executor; therefore also the damages recoverable in lieu thereof, out of which (recovered) the Debts and Legacies of the Testator are to be satisfied. Beside, this Action of Trespass is a thing severed from the state of the Land, so as if the owner thereof had, after this Trespass done, aliened the Land, yet had not this Action remained to him, as I take it clearly. And why not, as well as where a Trespass is done upon the Lands of the Lessee, and then the term expires? this doubtless doth not take away his Action, nor his Executor's. But methinks here may be some differences probably taken: as first, between a Trespass

pass in destroying or taking away Corn growing , and a Trespass in Grass or Wood growing. For the first being of that nature, as that, though the Owner had a state of Inheritance in the Land whereon it groweth , and should have died before severance and felling, yet it should have gone to the Executor, and not with the Land to the Heir ; therefore doubtless doth the Action for destroying or taking away thereof accrue by the operation of Law to the Executor, in lieu of the thing taken or destroyed. Otherwise, perhaps, of Wood or Grass, which by the Owner's death should have gone to the Heir , and not to the Executor. And yet here again another difference, methinks , may be betwixt Grass and Grass, *viz.* betwixt that in Pasture and that in Meadow , yearly mowed and turned into Hay, not left to be consumed by the mouths of Beasts , as that growing in Pasture : For as the Law distinguisheth between these Soils, it gives precedency to Meadow , and makes it waste for a Lessee to plow it up, not so for Pasture. Yea, Tithe is paid of Hay, but not of Grass growing in Pastures : so the Meadow-grass, being in the Owner's purpose

H

pose and intention as a thing severed from the Soil, should, methinks, so be also in the eye and estimation of the Law, and therefore stand in a different state and account from Pasture-grass.

A third difference may be in the manner of the Trespas, viz. Where Meadow-grass is eaten up with Cattel by a Trespasser, and where by him mowed and carried away as Hay: for in this latter case an Action of *Treuer* and *Conversion* for so many Loads of Hay is doubtless maintainable by the Executor; though it should be admitted that in the other case, of consumption by the mouths of Beasts without severance, no Action should be maintainable by the Executor; which yet I admit not, but think the contrary probable.

For when Meadow-ground, which yearly conceiveth, (*Sol sine homine generat herbam*) shall be ready to be delivered of her burthen, if a stranger put in a herd of Cattel, which swallow up and tread down this fruit of her Womb before the Mower with his Sickle come as a Midwife to help her delivery, if then by the hasty death of the Owner, before Action brought, this great Trespas should be dispunishable, it were

At least, methinks, Action upon the Case here and before should be maintainable.

were contrary, as methinks, to the purpose of the said Statute, and a great defect in the Law.

Yet here, perhaps, touching this a fourth difference may be or arise out of the time of the death of the Owner, *viz.* where he dieth before time of Mowing, and where not; for *dato* that in the former case, because, if such destruction or consumption had not been, yet the Owner dying before severance, this should not have come to the Executor, but have gone with the Soil to the Heir, that therefore the Executor, who is not damaged, should recover no damages: yet in the other case, the Owner living till after Hay-time clearly passed, *viz.* till the end of *August*, methinks now, since this fruit of the Meadow's Womb should have been a Chattel severed, had not this Trespasser made unlawfull prevention; therefore the Executor, to whom the same should have come towards the performance of the Will, should have, out of the said Statute, an Action and remedy reached unto him, to recover recompence in damages for this wrong done *in retardationem Executionis Testamenti.*

A fifth and last difference may perhaps be in the state of the Owner : for *Posito* that where the Land is his Freehold or Copyhold Inheritance, no Action should be given to his Executor for Wood or Grass taken or destroyed in his lifetime ; yet where he is but Tenant for years, Gardian, or Tenant by Extent, so as the very state in the Land was to come and is come to the Executor , (together with *quicquid plantatur solo*) methinks the Executor should have , together with the state in the Soil, the Action to punish the Robber of or Trespasser upon the Soil. Thus having scanned and sifted , to the best of my ability , all differences and circumstances of this Point , how far I am wide and wherein right *Aliorum sit judicium*, or rather, *Altioris esto judicii*. But this is clear, that wheresoever Executors do recover any damages for Trespass or other wrong done to their Testator, the money recovered (at least if Execution be had, or money received) will be *Assets* in their hands, as well as Debts recovered upon Bonds, or Bills, or Lands by them taken in Extent upon Statutes, Recognizances, or Judgments. Yea, without ever having these moneys, Executors may make

3 H. 6. 3.
Littleton, fo.

42. a.

So held in
Sale's Case
of damma-
ges in *Qua.*
imped. re-
covered.
Contr. of the
Present-
ment, Re-
leaving.

13 Ed. 3.
T. 1. 91.

make them *Assets* in their hands, viz. by making Releases or Acquittances, or acknowledgment of Satisfaction; for this amounteth to a Receipt, and chargeth the Executors towards the Creditors with the whole penal sum, though haply they receive but part, as the principal, or some like proportion.

Therefore there is great caution to be used by Executors in this kind, that unless they be sure they have Goods sufficient to pay all Debts and Legacies, they make no Release, Acquittance, or Acknowledgment of satisfaction, for more then they receive, be it Debt or Damages.

And the like caution is to be used by them touching submission of Debts or damages to Arbitrement, whereby discharges of the same may grow: for the submission to the Arbitrement being their voluntary act, although the Arbitrators by their Judgment do discharge the Debt or damage in part, or in whole; yet shall the Creditors have like remedy thereupon against the Executors as if they had released, or, which is more, received the same.

Other Actions there be of Discharge, which as the Testator himself in his life-

Error 13 ff.
4. 6.
46 E. 3.
Yet upon a
Verdict in
Square im-
ped. the
Wife, not
the Execu-
tor of the
Husband,
did seize.
9 H. 6. c. 4.

time might have had, so may his Executor after his death, *viz.* Writs of Error, Attaint, Disceit, *Audita Querela*, *Identitate nominis*. But this last is given by Statute. Whatsoever is regained by any of these ways as unduly lost by the Testator, shall also be *Assets*.

Special Cases pertinent to the
Premisses.

1. *Chattels come to the Executors from the Testators, yet not Assets.*
2. *Assets which be no Chattels.*
3. *Things in Action, and in the Personalty, turned into Chattels real, & c contra.*

AS to the first, I exemplifie thus: *A* makes *B* his Executor, and dies; *B* makes *C* his Executor, and dies: the Goods left by *A* to *B* as Executor far exceed his Debts and Legacies. Or let us suppose no Debts nor Legacies of *A*, and that *B* dieth much in debt above the Goods he leaveth, and did make no alteration of the property of the Goods of *A*, but meerly left them to *C* his Executor.
Now

Now shall not the Goods which came to *B* as Executor of *A*, and so from *B* to *C*, be liable in Law to pay the Debts of *B* : yet in Conscience methinks they should, and that *C* should not receive them to his own use, as in Law he may, where *A* left no Debts. But if *A*, making *B* Executor, did also by his Will give him all his Goods, and he in his life-time made election to have them as Legatee, or by his Will did so dispose of them, or appoint them to go, as the Goods he had as Executor; they could not be otherwise given or disposed. Now by this election they were altered in property from being his as Executor, and so as his own Goods should be liable to his Debts. But things in Action could not be so given or disposed, *viz.* Debts, &c. Yet if *D* were indebted to *A* one hundred pound, and *B* his Executor took new Bond of him, or another for it, giving up the old Bond; now was it become his own Debt, and so shall stand in his Executor.

Another instance of this, thus : If *A*, Patron of the Church of *D*, grant to *B* the next Avoidance, the Church becomes void, *A* dies before he presents, his Executor presents, and hath the benefit

Or if a stranger usurp in his life, and he dying, his Executor

recovers in
a *Qua. imp.*
as by Sale
was done
infra. Mich.
32 & 33 E-
liz. So held
in Sale's
Case, in com.
ban. *Vendere*
jure potest,
emerat. ipse
prim.

of preferring his Son or Friend; yet shall this make no *Assets* in his hands for payment of Debts, for that he could not lawfully take money to present. But if *B* had died before the Church had become void, then, because the Executor might lawfully have sold it, the value should be *Assets* in his hands, as I conceive; except perhaps the Incumbent had died so hastily after *B*, that the Executor had not time convenient to find out a Chapman and to sell it.

If in the other Case a stranger had presented, and got his Clark admitted, and the Executors of *B* had in a *Qua. imp.* recovered damages; the mony so recovered should have been *Assets*. Thus much of the first, *viz.* that some things of the nature of Chattels may come to Executors, and yet not be *Assets*.

Touching the second, *viz.* that some things may be *Assets* in the hands of Executors which yet are no Chattels, I shall give but two instances. First, where a man leaveth a Villain for years to his Executors, and the Villain purchaseth Land in Fee-simple, and the Executor entreth into the Land; now hath he Fee-simple therein, and this Land is

Assets

22 H.8. Br.
Villeinage
46. If he die,
how shall
this be *As-*
sets in the
Heir?

Assets for payment of the Testator's Debts. So if a man by his Will give Lands in Fee to his Executors, to be sold for performance of his Will; these (before the money thereby raised) are *Assets* both for payment of Debts and of Legacies. But if the Lands had been given to be sold onely for payment of Debts, they should onely be *Assets* for that purpose, and not for payment of Legacies: and so if it were expressed to be for payment of Legacies singularly, this should not be *Assets* for Debts, as I take it. For since these are not *Assets* of their own nature, but so made by the Will and disposition of the Testator; methinks they cannot be otherwise nor farther *Assets* then as the Testator hath willed and disposed. But though Lands thus given were *Assets* before the Stat. 21 Hen.8. cap. 5. yet how can it be so, since the very words of the Statute be, that if one do will by his Testament or last Will any Lands, &c. to be sold, neither the money thereof coming nor the profits taken shall be accounted as any of the Goods or Chattels of the Testator's; which I conceive to be all one as to say, that they should not be *Assets* for

3 H. 3. 63.
and so 2 H.
4. 21. If by
Feoffment.
Per Mark-
ham cap.
Just. con.
Rickbill.

See 9 Eliz.
Dyer 234.

9 H.D. 264.
14 H.D. 32.

for when an Executor denieth himself to have *Assets*, the form of his Plea is, *Quod nulla habet bona nec catalla, &c.* Yet since that Statute, *viz.* in the late Queen's time, the Law was twice admitted or conceived still to be according to the third of *Hen. 6. viz.* that the Land devised to be sold, or the money thereof coming, should be *Assets*. Indeed in neither of those Books is there any mention of the clause in the said Statute; and it is possible that it might be forgotten, as in other Cases sometimes hath happened. But casting about how to reconcile those Books with the said Statute, and not to suppose the same forgotten at both times, both at the Barre and Bench, (though, being but a short clause in the middle of a large Statute to other purpose, it might well so have been) at the last, though not hastily, I grew to conceive, that the said Clause being in an Act which limiteth the Fees of Ordinaries, and their Scribes, according to the value of the Goods of the deceased, and then bringeth in this Clause, that the Lands willed to be sold shall not be accounted as any of the Goods, &c. the Parliament meant thereby onely to exclude

clude them to this purpose, that they should not be accounted as part of the Goods in the valuation, according to which the said Fees were to be rated; and though the words be general, that they shall not be accounted as any of the Goods, &c. yet is it the more probable that the Parl. intended no farther then as aforesaid, because that Clause after the Fees limited in answerableness to the values is brought in by a *Proviso, viz.* Provided always, that if the deceased willed any Lands to be sold, the money nor profits shall not, &c. And thus perhaps it was understood and construed in the said late Queen's time; though no mention be of any remembrance of that Clause or Provision in either of those Cases reported by the Lord Dyer.

As for the third, *viz.* the changing of things out of the Personalty into the Realty, & *à contra*, I shew it thus: If a Debt were due to the Executor as Executor, by Statute, Recognizance, or Judgment, and he sue Execution, and have Land of the Debtor's in Extent; now is the personal duty turned into a Chattel real. On the other side, if such an Estate by Extent, or a Lease for years
mortga-

mortgaged, come to an Executor, and the Debtor or Mortgager payeth the money due; now are these real Chartels turned into *Assets* personal.

Another special Case of Equity opposing Law.

IF *A* be bound to *B* by Bond, Statute or Recognizance, for assurance of Land, *B* dieth, and the Land descends to his Heir; or be it that *B* sold the Land to *C*, and assigned to him the Bond, Statute, &c. yet must the Suit or taking out be in the name of the Executor of *B*, and neither of the Heir nor Assignee. And that which is recovered or gotten in Extent will be *Assets* in Law to charge the Executor, as I take it; yet in Equity it pertains to the Heir or Assignee. *Quare*, if the Executor meddle not, but onely suffer his name to be used.

Of things come to Executors by Condition.

FIRST, we will consider of Conditions bringing back to Executors Goods or Chattels granted away by their Testators. Touching which there is no doubt, but if the Condition be any other then for payment of money, or other things

valuable by the Testator or his Executor, the Chattels returning to the Executor are *Assets* in his hands: as put the Case a Lease for years, Horses, Sheep, Plate, or other Chattel, were granted by the Testator to *A*, upon condition that if *A* did not pay such a summe of money or doe such other act as the Testator appointeth, &c. and this Condition is not performed after the Testator's death; now is the Chattel come back to the Executor, and his *Assets*. But the question hath been, (and perhaps may be) where the Condition is, that the Testator or his Executors shall pay the money to make void the Grant, and accordingly the Executor after the Testator's death payeth the summe out of his own purse, not having any money of the Testator's in his hands: in this Case coming in question *tempore Hen. 7.* it was resolved at the last, that this redeemed Chattel should not be *Assets*, but be to the Executor as his own proper Goods; though at the first three Judges were of contrary opinion, *viz.* that the Goods redeemed should be in the Executor as Goods of the Testator. And truly I must confess, that I cannot yet finde good satisfacti-

on

21 Hen. 7.

on in that Book's resolution, except we shall take the Case there to be such as that which is put and reported by the Lord *Dyer*, *tempore Hen. 8. viz.* that the money paid for redemption was as much as the full value of the Goods pledged or mortgaged; or else shall admit the Case to be, that this redemption was not by payment at the day conditioned. As to the first, it were rare if any should lend money upon a Mortgage, where the thing mortgaged is not of better value then the money lent; rare also that an Executor should take care to redeem with his own money that which should yield no benefit or advantage to him, or his Testator. Let us therefore scan and examine the Point, since the same may come frequently in use: and this we may the more decently do, because the Lord *Dyer* in the Margent of the Case by him reported, as aforesaid, saith expressly, that the said other *temp. Henry* the seventh was not at all adjudged, himself having viewed the Roll, which he there sets down, and the names of the parties. We will therefore put the Case thus: *A* possessed of a Lease for sixty years of one hundred pound Land

I and mortgageth it for five hundred pound; or be it that the Mortgage or Pledge be of a Jewel or piece of Plate for half the value; and now before the day limited for payment and redemption *A*, having made *B* his Executor, dieth, and *B* at the time and place maketh payment as was conditioned: Now the question is, whether this Lease, Plate, or Jewel, being worth much more then the sum for which it was mortgaged, shall be in him wholly in his own right and to his own use, or partly, if not wholly, as Executor to *A*, so as to be subject to the payment of Debts and Legacies. Here it must be clearly admitted, that *B* was enabled to this redemption onely and meerly by the Condition annexed to the Mortgage or Pledging. It must also be admitted, that this Condition, and the power or interest to take benefit thereof, came to him and was derived onely as Executor of *A*. This being premised, it must needs follow, (as to me it seems) that the Condition working and having his operation in the redemption to destroy the Grant, Mortgage, or Pledging, it must needs make these things again the Testator's Goods in statu

in quo prius, and so to be in *B* as Executor; since in that right onely he was intituled to take benefit of the Condition. For what is it which hindered, before this, from being the Testator's Goods? nothing certainly but onely the force and strength of the Mortgage or Pledge. Now by the Redemption that is become void, and hath lost its force; therefore the property of these things must now needs be as if no such Mortgage or Pledge had been, or as if it had at the first been void and of no force. Thus must the Condition work for him who made it, *viz.* *A* the Testator: and those of the contrary opinion in the time of King *Henry* the seventh do yet say, that by this Redemption the Testator is so much indebted to the Executor as he disbursed for the Redemption; which could stand with no reason, unless by it the property and Interest should be reduced to the Testator's behoof. That thus it is, is also proved, as to me it seems, by the Case of Mortgage of Inheritance, upon which the Heir making payment, according to the Condition, is not now in as a new Purchaser, but as Heir;
so

so as he shall have his Age, and be in Ward even for this Land; yea, it shall be *Affets* in his hands for satisfaction of his Father's, as other Ancestors Debts: which in some respect is a harder Case then that of the Executor; for he hath means to satisfie himself of the money disbursed, either out of the thing redeemed, or other goods of his Testator, but the Heir hath no such means. Yet it will be asked, how the Executor can be free from mischief: for if this thing redeemed be intire, as the Cup or the Lease, the whole will be taken in Execution for the Testator's Debt. To admit this, yet here is one clear way of remedy, *viz.* The Executor may before such Execution sell the thing, and so pay himself, and retain the Surplusage to the Testator's use; and the like of this is frequent in use, *viz.* for Executors to pay off the Testator's Debt with their own money, and to make themselves satisfaction out of the Testator's goods. Besides, it is not impossible that this redeem'd thing should be thus in interest parted, that answerably and proportionably to the Sum disbursed for redemption, with reference to the value of the thing redeemed, a moyety,

or third part, or three parts thereof, should be to the Executor in his own right, as his own proper Goods, and the rest in him as Executor. As *posito* that *A* and *B* were Tenants in common of such an entire Chattel: *A* maketh *B* his Executor, and dieth. Now hath *B* one moiety as Executor, and another as his own proper; and upon a Judgment against him as Executor, that moiety onely which he hath as Executor must be taken in Execution. And here may be remembred, how in Execution of a Judgment, or levying of an Amerciament out of an intire Chattel of more value then the Sum to be levied, the whole is to be sold, and the Surplussage above the Debt or Amerciament is to be delivered back to the Owner. For in all this debate we must presume the thing redeemed by the Executor to be of better value then the Sum paid, else we may easily admit the whole to the Executor.

Again, the Lease for years is not so intire a thing, I mean the Land let, but that thereof Partition may be made, yea, enforced by Action, between Joint-tenants and Tenants in common. But here will be objected the Case of Redemption by
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the Daughter and Heir, who though she hath a Brother born after, so as now she is no longer Heir, yet she shall, as the Book saith, retain the Land redeemed from the Heir as a Perquisite or Purchase. As for this, (which I will not oppose) the Law so frameth to the favour of the Daughter, because of great mischief to her, if, being stripped of the rest of the Inheritance by the birth of a Brother, she should also lose that which her money had redeemed, without having any remedy to have her money again or any recompence for it. But in the other Case there is no such mischief, for that the Executor may pay himself, as hath been shewed.

Now on the other side, if the Case shall be understood that the Redemption was by payment after the day, then will I easily admit that the property or interest is in the Executor to his own use; or that the Condition now having no power to reduce it back, or to operate any thing, it is rather a Re-emption than a Redemption, since it was at the Will of the Mortgagee to dispose it at his pleasure; and any Stranger, as well as the Executor, might thus have redeemed,

med, *viz.* repurchased it : therefore onely Equity, and not Law, in that Case can make any part of the value *Assets* in his hands. And so also, I think, if we should admit in the other Case of payment at the day that the property of the Chattel is to the Executor as his own, and not his Testator's goods, no part of Surplufage of value can in Law be *Assets*, howsoever in Equity.

Lastly, if the Executor redeem by payment at the day with the Testator's own money or goods, none will doubt but that the thing redeemed is in him as Executor, and the money by him paid for Redemption is well Administred, the goods redeemed being of better value. But this way it makes no difference whether the whole value of the goods redeemed shall be held *Assets*, and the money paid for Redemption stand drowned therein; or that that Sum be still adjudged in the hands of the Executor as *Assets*, and onely the Surplufage of the thing redeemed over and above the Sum paid for Redemption.

Things accrued by Covenant or Assumption.

IF *A* covenants with *B* to make him a Lease of such or such Land by such a day, and *B* dieth before the day, and before any Lease made; now must *A* make the Lease to the Executor of *B*, and the Lease so made to him shall be in him as Executor, and consequently as *Assets*. This is proved by the Judgment in the Case between *Chapman* and *Dalton* in the late Queen's time. Yet I confess that it is not expressed in the Resolution of this Case that this Lease should be *Assets*, but that the Executors should have the Term as Executors, which implieth as much in my understanding; and the Declaration whereupon the Defendant demurreth sets forth the breach of that Covenant to be *in retardatione executionis Testamenti*; so as the damages thereupon recovered, viz. 3301, were *Assets*, and consequently also should the Term have bin in lieu and recompence whereof these Damages were given. The like Law, if *A* assume upon good consideration to deliver in to *B* by such a day 20 quarters of Malt, or so many Loads of

Plow. Com.

Coals or Wood, or any other Wares or Merchandise, and this is not performed in the life of *B*, but after to his Executor; it shall be to him as Executor, and shall be *Assets* in his hands, as well as the money recovered in damages for not performing should have been.

Of things accrued by Remainder or Increase.

IF a Lease be made to one for life, the Remainder to his Executors for years, and he dieth; this will be *Assets* in the hands of his Executors, though it were never in the Testator, as was in the latter end of the late Queen's time resolved by three Justices, the Lord *Anderson* only being of a contrary opinion: and there it was said that *Cranmer's Case*, wherein the contrary in effect was resolved, was of little Authority, for that there were first two Judges against two, till after *Mounson* changed his opinion, upon a conceit that there the Estate was by way of use, which could make no difference. Like Law, where a Lease for years is by Will bequeathed to *A* for life, and after to *B*, who dieth before *A*; although *B* never

ver had his term in him so as that he could grant or dispose it, yet shall it rest in his Executor as his Goods, and be *Assets*. As for a Remainder for years so in the Testator that he might grant or dispose it at his pleasure, no doubt can be thereof; though the same fell not in possession to the Testator in his life-time, yet no scruple nor doubt can be but that this is *Assets* to the Executor, even whilst it continues a Remainder, and before it falleth into possession, because it is presently valuable and vendible.

Nor much of other nature to these are the Cases where the Executor merchandizing with the Goods of his Testator maketh gain thereof. II H.6.35.
per Babington.

So if the Sheep or other Cattel of the Testator do breed, *viz.* bear Lambs, Calves, Colts, &c. after the Testator's death, even these which were never in the Testator shall yet be *Assets*; and so the Wool growing upon the Sheep after the Testator's death. But there is one Case worth the consideration, and worthy of some doubt, as I think, and that is this: One leaveth to the Executor a Lease for years of Land worth 20 pound by the year, and the Executor,

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keeping

keeping this in his own hands one yea after the Testator's death, doth make thereof thirty pound in clear gain above all charges; now whether, as to a Creditor, this whole thirty pound shall be *Assets*, or onely twenty pound. And the Case, simply thus put, shall be understood of an occupying and manuring without any stock of the Testator's; and then, if the Executor did stock it with his own Sheep or other Cattel, as he must have born the losse by rot or death, so is it reason that, if the Manurance prove gainfull, he reap the fruits thereof in recompence of his adventure, and of his industry, skill, and good Husbandry. But if the Testator's stock of Sheep and Cattel were (as of necessity, or for the better advantage of the Testator's Estate) continued upon the Lease-Land, then is it reason that the gain or losse, whether-foever of them God sendeth, do redound to the Testator's Estate. Like Law (as I think) if an Executor, finding that he cannot instantly after the Testator's death let the Lease, I, and near the value, shall therefore buy seed-Corn, and hire the Plowing, &c. But it may be said, that the Lease hath one entire valuation at the first upon the Appraise-

Appraisement. To this I answer, first, that the value upon the Appraisement is not binding, nor much respected at the Common Law : if it be too high, it shall not prejudice the Executor ; if too low, shall not advantage him : but the very value found by Jury, when it comes in question whether the Executor have fully Administred, or have *Assets* or not, is that which is binding. Next I say, that if a long Lease come to Executors of Land worth an hundred pound by the year, and no sale is made thereof by the space of a year or more ; now the term continuing of the like value as at first, it is no reason but this hundred pound raised the first year should go towards the payment of Debts and Legacies, rather than any of them should be unpay'd. These things, I mean the knowledge of them, are usefull two ways, *viz.* First, to give light to Executors, to discern what unto them of right pertains : Next, to shew unto Creditors and Legatees what, and how far, things shall be *Assets*, that is to say, Goods to enable, charge, and bind Executors to pay Debts and Legacies. For whatsoever any of these ways cometh to the Executors from their Testator, or
is

is recovered by any of these Actions, shall be in their hands *Assets*, the cost and charges of recovering deducted.

CHAP. VII.

What manner of Interest an Executor hath in his Testator's Goods and Chattels, and how different from the common Interest which they or others have in their own proper Goods.

THE Interest which an Executor hath (as Executor) in the Goods of his Testator is much different from the absolute, proper and ordinary Interest which every one hath in his own proper Goods, as may well appear in and by these Points. First, Although a Stranger take away these goods, the Action of Trespass for the Executor is of general form, *Quare bona sua cepit*, calling them his Goods; whereas a man outlawed in Debt, &c. or convict or attainted of Felony or Treason, forfeiteth all his own Goods, yet these which he hath as Executor shall not be forfeited. If a Villain be made Executor, his Lord cannot

24 E.3.f.35.

32 H.6.34.

not take these Goods, though he may take all the Villain's own Goods: and for taking such goods, or for a Debt due to the Testator, a Villain may sue his Lord. Nay, if the Executor grant all his goods, some good opinion hath been, that these which he hath as Executor should not passe; yea the Lord *Dyer* so held in the late Queen's time, with this difference, *viz.* Where the Grantor is named Executor in the Grant, there the goods which he hath as Executor should passe; but otherwise, if he be not named Executor in the Grant. And that this opinion is probable, will farther appear by that which followeth.

Secondly, The Executor cannot by Will give or bequeath the Goods he hath as Executor; and if he die intestate, and Administration of all his Goods is committed to *J D*, yet hath he nothing to doe with the goods which the Intestate had as Executor to his Testator: Thus *all his goods* reacheth not to his goods as Executor.

Thirdly, Whereas a man's goods stand liable to the payment of his Debts both in his life-time and after; the goods which a man hath as Executor are not to be taken

Lit. tit. Villainage 41,
42. 10 E. 4.
f. 1. Yet
39 H. 6. f. 15.
A release of all Actions by an Executor extinguishes Actions as Executor. But *Frowick* is against it in *26 Hen. 7. Kel. 64.*

See these so resolved in *Pl. Com. 5.*
25. inter
Bransby &
Grantham,
P. 20 Eliz.

taken in Execution for his own Debts, either upon a Recognizance, Statute, or Judgment had against him. And if such a one die indebted, leaving to his Executor much goods which he had as Executor; these are not *Assets* in his hands liable to the payment of his Debts, but onely for the payment of the first Testator's Debts or Legacies. Therefore a *Quo minus* brought by an Executor, shewing that he was not able to pay the King's Debt because the Defendant detained from him an hundred pound, which he owed him as Executor to *J S*, was overthrown; for that it could not be intended, saith the Book, that the King's Debt could be satisfied with that which the Plaintiff should recover and receive as Executor. Whereas a Woman being possessed of any Chattels personal, *viz.* moveable goods, all are devested out of her into her Husband by her Marriage, so as if he die, and she over-live, they be not her's again, but her Husband's Executors or Administrators; and if she die, all be the Husband's, without being Executor to his Wife. It is not so of the goods which she hath as Executor; these still remain in and to her, if her Husband die: and
if

if she her self die, for that she hath them as it were in another's right, *viz.* as she represents the person of her Testator, her Husband shall not have them; if he be not his Wife's Executor, and so Executor to her Testator.

Lastly, Whereas the Writ of Trespass seems to make no difference between one's own goods and those he hath as Executor, that being a possessory Action or Suit grounded upon the Possession; yet come to an Action of Debt, which more tastes and participates of the right, and there are they differenced: for where for my own Debt, when I sue, the Writ saith, *Debet & detinet, viz.* that the Defendant owes me and detains from me that Summe; yet when I sue as Executor, the Writ saith not *Debet*, he doth owe me, but *Detinet* onely, he detains from me, as admitting that he is not Debtor to me, though he should pay me. And so where I am sued as Executor, the Writ makes me not a Debtor, but a Detainer; otherwise, where in my own right I owe, and I am sued for a Debt. Accordingly, where Judgment in an Action of Debt is given against one as Executor, it is not generally that the Plaintiff shall

This may be in his name onely out of whose possession the goods were taken.

Co. l. 5. f. 31.

shall recover against him, but he shall recover of the goods of the Testator; and therefore upon this Judgment no *Capias* lieth against him, to inforce him to pay by Arrest of his Body, because he is not properly Debtor. But if after it be returned, that he hath wasted the Testator's goods out of which the said Debt should be satisfied, then, he having made himself a Debtor, a *Capias ad satisfaciendum* shall be awarded against him, and then he shall be taken in Execution. So also in some Cases of false Plea pleaded; for where the Judgment is *de bonis propriis*, the Plaintiff may have a *Capias ad satisfaciendum*; and that Judgment is in divers Cases for the Damages, although not in many for the Principal. As for the *Capias* before Judgment, in the main Process against an Executor, that is because of his Contumacy in not appearing upon the former Process.

34 H.6.45.

The reason of this different Interest between an Executor and another, or between the same man's having Goods as Executor and others in his own right, as also of the different manner of one's being indebted as Executor and otherwise in his own right, is well expressed by

by the Lord Cook in *Pinchon's Case*, viz. First, that the Goods which one hath as Executor he hath not in his own right, but in *auter droit*, that is, in the right of another, meaning his Testator. Secondly, that Executors are but the Ministers and Dispensers, or Distributers, of their Testators Goods.

Co. lib. 6. 88.
b.
See this also
Flow. Com.
5. 20. 2.

Of alteration of Property in the Executor's hands, so as some Goods become his own, which he had as Executor.

TO this Head or Chapter, treating of the difference between the Interest in Goods as Executor, and others had merely in one's own right and to his own use, it is not impertinent to consider how that which one hath at the first as Executor may be changed in Property, and become the Executor's own to his own use, as other his Goods which he had not as Executor. Here let us first consider of ready money left by the Testator : for since pieces of money, viz. shillings, groats, pieces and half pieces of Gold, cannot be known one from the other, it must needs follow, that these coming to an Executor from the Testator, must in some sort

fort be altered in Property, so as though the Executor shall be said to have so much in money or value, yet can it not be discerned which money in his house was his Testator's, and which his own. Consequently the Sheriff upon the *Fieri facias* for a Creditor, who hath recovered against the Executor a Debt owing by the Testator, cannot take away money in Execution as the Testator's, in my opinion. *Quare*, if thereupon a *Devastavit* shall be returned, or what shall be done.

But what if the Testator were indebted to the Executor, or if the Executor, not having ready money of the Testator's, or otherwise, shall pay a Debt of the Testator's with his own money, what shall we say of the Conversion or Alteration of some of the goods from being his as Executor, to be his meerly in his own right? Hereof I have shewed elsewhere my conceiving, which is briefly thus; That except either he have in his hands money of the Testator's, (for of that it is easie to make a proportionable change) or unless the summe to him owing from his Testator, or by him paid for his Testator, amount to the full value of all the Testator's Goods in his hands, or do exceed

2 *El. Dy.* 185.
This divers
Books affirm,
20 *H. 7.* 4.
& *Kel. Rep.*
59. & 2, 3
El. Dy. 117.
6 *H. 8.* Dyer
fol. 2. 2.

reed the same, no Alteration can be, untill some Election or Declaration by the Executor made which of the goods, not exceeding the Debt unto him, he will have to be his own: For where the Testator's goods exceed this Debt to him, the Property of all cannot be changed; and of what part shall the Law adjudge the change, till choice by the Executor? It is good therefore for him to doe as the Mother-Guardian in Socage, who is to endow her self, calling her Neighbours, and expressing to them which part of the Land she will have for her Dower. So let the Executor doe. But let him take heed that his Election or Declaration exceed not his Debt, lest it be void. And that such particular Election is to be made, seems to me proved by the Case of 21 E. 4. fol. 21. where the payment of money, and detaining or taking of a Horse of the Testator's, is mentioned. But *Choke* there says, this cannot be done without the Ordinarie's Assent. And the Reporter thinks, though the Ordinary do assent, yet the Property shall not be turned into the Executor as his own.

Plow. 554. So of a Legacy in money given to the Executor.

See 2, 3 E. 4. Dyer 187.

Another Alteration is of the profits of a Lease come to the Executor from the Testator : For since no more thereof shall stand in the Executor as *Assets* then so much onely as exceeds the yearly value, according to the resolution in *Hargrave's* Case, it must needs follow that the residue of the profits must be the Executor's, he paying the Rent out of his own purse ;
Co. 1. f. 51. b. as that Case resolves in consequence, *viz.* that he shall be sued for it in the *Debet*, and in the *Detinet* onely as for the Rent due before the death of the Testator. Thus though he have the Lease as Executor, yet part of the profits are meerly his own, not as Executor.

And looking back upon this Case, we may discern a necessity sometimes of the Executor's paying with his own money for his Testator's Debt : as where the Testator being to pay a Rent at *Michaelmas* or our *Lady-day*, he dies a day or two before, or, to put it more clearly, a day or two after the Feast, not leaving any goods to pay the Rent, other then the future profits of the Lease. Here, unless that the Executor will forfeit the Lease, he must lay out of his own money.

Now

Now if in this and other like Cases he could not doe this untill he had under Seal, or by act in the Court Spiritual, an Assent of the Ordinary, it would be an extraordinary trouble to Executors.

I finde also *tempore Hen. 7.* another 20 H. 7. 4. a. mean of altering Property, to wit, where a *Fieri facias* comes to the Sheriff to sell or levy a Debt of the Testator's goods; now, saith the Book, may the Executor buy these goods of the Sheriff as well as another; and if he do, the Property which he had as Executor shall be turned into a Property *in jure proprio*.

If an Executor amongst his Testator's goods find and take some not his, and after, these being claimed by the Owner, who left them in the custody of the Testator, the Executor not crediting the claim, still keeps them, and the Owner thereupon recovers damages in an Action of Trespass, or of Trover and Conversion; now (and so in all other like Cases) are these goods become the Trespassor's in property, because he hath paid for them: 20 H. 7. Kelw. Ca. 58. therefore it is not strange, if in like manner an Executor, paying out of his own purse for or in lieu of the Testator's

K 2

goods,

goods, have so much of them (where no certainty) changed in property, and become his own. This is but put as an instance understood with the exceptions and cautions precedent.

CHAP. VIII.

*Of some cases and questions between the
Executor and the Heir.*

21 H.6.30.
If other
goods taken
among
them, he is
excused.

21 H.7.25.
Vid. Lib.

Imr. 640. It
is so plead-
ed.

THE Executor may in convenient time after the Testator's death enter into the House descended to the Heir, for the removing and taking away of the Goods, so as the door be open, or at least the key be in the door: and this I understand of the door of each Room. For although the door of entrance into Hall and Parlour be open, the Executor cannot by that justify the breaking open of the door of any Chamber to take goods there, but onely may take those in the Rooms which be open. And this is proved, as to me it seems, by the Case of the Chest with Evidences, which, saith the Book, the Executor may

may take and put out the Deeds, delivering them to the Heir, viz. the Chest being unlocked, as I understand it. Now a Chamber or other Room within a house locked is an inclosure of better respect than a Chest. But if the goods be not removed within convenient time, the Heir may distrain them as *damage feasant*.

43 E. 3. 24.
Bro. 145.
makes a
Quare. if it
be locked.

Plow. Com.
280.

Where the Testator recovers Land and damages, or a Deed and damages, he dying before Execution, the Heir shall have execution for the Land or Deed, and the Executor for the damages: but *temp. Edward. 4.* it is said, that untill the Heir sue a *Scire facias*, the Executor cannot sue Execution for the damages.

43 Ed. 3. 2.
10 Ed. 4. 5, 6.
Of the Deed
Execution
first.

If a Creditor be made Executor by his Debtor, and pay himself part out of the Goods, he cannot sue the Heir for the rest, because the Debt cannot be apportioned; but otherwise he may, saith the Book: yet *Quare*, if he do take upon him the Executorship, and have goods sufficient to pay all.

12 H. 4.

If a Debt be recovered against one who dieth before Execution sued, leaving goods sufficient to satisfy; now shall not the Land descended to the Heir be char-

7 H. 4. f. 31.
See Bro. 124.
124.

ged therewith, nor by like reason any Land conveyed after Judgment.

Co.l. 2f. 90.
91. To like
purpose see
more, Littl.
f. 77. b. 2 El.
Dyer 281.
Plow. Com.
291.
21 H. 7. 4.

See a good difference, where Land is conveyed upon condition of payment to the Vendor, his Heirs or Assigns, and he dieth before the time, and where it is to be paid to the Vendee, his Heirs or Assigns, and he dieth : in the first Case payment shall be to the Executors, but not in the other.

What things pertain to the Heir, and what to the Executor, is before shewed. As for *Frowick's* opinion, that where goods be mortgaged upon condition, that if the Heir or Executor pay, &c. here if the Heir make payment, he should have the Goods, I see not, for my part, how that can be.

A Directory for the following Chapter.

A. All (as lat one) represent the Testator's person, and must joyn and be joyned in Suit ; & è contrá.

B. Where one alone must answer Suit, and how.

C. When they differ in Plea, the best shall be

be taken, but one may confess alone.

D. One, as well as all, may give Assent, or release the whole.

E. One cannot give, nor release to another, nor divide.

F. The possession of one is the possession of all, to what purpose.

G. If the Survivour die Intestate, the Testator is Intestate, though the other Executor left an Executor.

H. Executor included in the person of the Testator, and represents it, is his Assignee; all one: & c. contra.

I. What change by death of the Testator, touching proceeding in Suit.

K. Proceed to or in Execution; where without Scire facias.

M. Whether the Executor stand in his own quality, or his Testator's.

N. Where one alone may sue.

O. In Suit for them, such as will not joyn shall be severed, and the other may sue and prosecute alone: Consequents indé.

P. Death of one Executor, Plaintiff or Defendant, where abates Writ.

CHAP. IX.

How Executors stand between themselves, and in representation of or relation to the Testator, as his Assignee or Deputy, or as the same person with him; and where, and to what purpose, as other persons.

Are as one person; therefore cannot plead several Pleas in Abatement.
 37 H. 6. 17.
 39 H. 6. 44.
 38 E. 3. 9.
 Bro. Ex. 13.
 Bro. Ex. 20.
 21.
 There is one Executor sued, if he pleads that there is another Executor not sued, must plead that he did Administer.
 9 H. 6. 44.
 Bro. 1. 33.
 H. 6. 38.
 Bro. 20.
 32 E. 3.
Quid juris clamat 5.

FIRST, all of them do represent the person of the Testator, and therefore must they all joyn in Suit against others, and in Suit by others they must be all made Defendants, or at least so many of them as do Administer: for though the Executors themselves must take notice by the Will how many Executors there be, and must frame their Suit accordingly; Creditors and Strangers need not take notice of any more then do Administer, and execute the office of Executors. For this reason, as I take it, in the time of King *Edward* the third, where two Executors were of a Term, and the Reversion was granted by Fine, mentioning but one Term, and thereupon a *Quid juris clamat*

clamat accordingly brought against that one Executor; this was held good enough, though the other Executor was not named in the Suit: belike; because that one (who indeed was the Testator's Wife) did only occupy the Land, and take the profits thereof; for else, since all the Executors do represent the Testator's person, all must have been named. Therefore did the Judges resolve in the time of *Hen. 4.* that where a Lessee for years made two Executors, and one of them was distrained by the Lord for Rent, who avowed upon the Lessor; that Executor should have Aid of his fellow-Executor, to the end that both might have Aid of the Lessor, which one alone could not. And upon this reason, *viz.* that the Executors represent the person of their Testator as one person, (for so speaks the Parliament) it was enacted in the time of *Edward* the third, that the Executors, though never so many, shall have but one Essoyn, either before appearance or after, because their Testator, whose person they represent, could have had no more.

13 H. 4.
Aid 186.

A.

9 Ed. 3. c. 3.

A.

It is farther also enacted by the said Statute, that where two or three Executors or more be, they being sued in an
Action

B.
 But not, if
 he appear at
 the sum-
 mons, 1 E. 4.
 1. 14 H. 4. f.
 11. But the
 Plaintiff
 must declare
 against all.
 He need not,
 but he may
 admit ano-
 ther to ap-
 pear and
 plead a ter.
 7 H. 4. 12.
 But Proceſs
 must be con-
 tinued a-
 gainst all.
 7 H. 6. 35.
 Executors
 of Executors
 by Equity.
 30 H. 6. 45.
 Bro. Exec.
 99. 28 H. 6.
 f. 4. 14 H. 4.
 23, 24. 89
 negatively.
 22 H. 6. f. 1.
 28 H. 6. f. 4.
 3 H. 6. 35. a.
 39 E. 3. 5.
 There it is
 not meerly
 as Execu-
 tors; it is out
 of the Stat.
 11 H. 4. 63.
 as if in Deb.
 & del.

Action of Debt, though all do not appear,
 yet such one of them or more as doth or
 do appear at the Grand Distress, shall an-
 swer alone without his or their Compani-
 ons. And this Statute hath been taken by
 Equity in three respects.

First, touching the Persons; that it shall
 extend not to Executors onely, but also to
 Executors of Executors, yea to Admini-
 strators also; though the Stat. speak onely
 of Executors.

Secondly, touching the Action; where-
 as the Stat. speaks onely of the Action of
 Debt, it is taken by Equity to extend to
 other Actions, as the Writ *De rationabili*
parte bonorum, and *Detinue*: yet per-
 haps this latter Action will be said not to
 be maintainable against Executors for
 their Testator's act, but for their own
 onely. But we are not yet come so far
 as to determine what is maintainable,
 but whether, before all the Executors do
 appear, he or they which have ap-
 peared shall be put to answer; and so
 to bring it to Decision, whether the
 Action be maintainable or not. I think
 also that in the Action of Covenant,
 and all other Actions against Execu-
 tors as Executors, he which appeareth
 must

must answer without his Companions ; though the greater opinion in the *Quadragesimes* were contrary touching the Action of Covenant. But as for the *Subpœna* against the Executors , which is to make them to answer to a Suit in Equity, that hath been *temp. E. 4.* taken to be out of the reach and intent of the Statute. So also of the *Latitat* in the *King's Bench*, as was held in the same King's time ; except all the Executors , making up the whole representative Body of the Testator, be in the custody of the Marshall, one or more of them who are there shall not be inforced to answer ; and so was it also lately held in the *King's Bench* , where Master Justice *Houghton* gave an excellent reason that this Case is out of the said Statute, *viz.* for that this Writ doth not mention any Debt, or name the Defendant's Executors.

Thirdly and lastly , that Statute is extended by Equity to other Writs or Processes : for where the Statute speaks onely of the grand Distresse , and the Executors appearing thereupon ; it hath been many times ruled, that when he or they appear upon the Attachment , *Capias* or *Exigent* , answer must be, though the

B.
Cont. 47 E.
 3. 22. So
 7 E. 4. 20.
 21. 3 H. 4.
 20. In *Sci.*
fac. upon a
 Pardon by a
 Defendant
 outlawed at
 their Suit.
 47 E. 3. 22.
 One's *Fenold*
 in the affir-
 mative.
 8 E. 4. 5.
 9 E. 4. 12.
 13.
 B.
 20 vel 21
fac. Regis.

B.
 1 E. 4. 1.
 40 E. 3. 1.

B.
 11 H.4.63.
 C.
 Or if but
 one appear,
 28 H.6.f.364
 Judgment
 against all.
 See 9 E. 4.
 12, 13, 14.
 Where B,
 who is not
 Executor, is
 jointly sued
 with A, and
 B confelleth.
 21 H.7. 25.
 Yet 7 E.4.7.
 they may le-
 ver in Pleas
 not dilato-
 ry.
 C.
 7 H.6. f. 6.
 per Cottel-
 more. If
 they reco-
 ver, and one
 of them
 prays a *Cap.*
ad sat. and
 the other a
Fieri fac.
 the first, as
 best, shall be
 granted,
 3 H.4.10.
 Bro. 44.
 So where
 the Defen-
 dant Out-
 lawed at the Suit of two Executors, and upon the *Scire facias* after his
 Pardon but one appears, 21 H.7.25. 9 E.4.12, 14.

the rest appear not; for so the word *Dis-
 stress* is taken for all compulsory means,
 or enforcement of Appearance. But
 where the Statute reacheth not, *viz.*
 when the Process is determined against
 one or more as by Outlawry, &c. there
 the rest must answer by the rules of the
 Common Law; except it be in the case
 of Husband and Wife Executors, for
 there the Wife cannot answer without
 her Husband, nor doubtless can he with-
 out her, where she and not he is Exe-
 cutor; but where both be Executors,
 there he may answer without her, but
 not she without him. When Executors
 as Defendants have appeared, if any one
 of them will confess the Action, this
 binds and concludes the rest; but if
 one will plead one Plea, and the other
 another, that (say some) shall be received
 which is best for the Testator's state: so
 where they sue, such as will not prosecute
 shall be severed, and the rest without
 them may proceed; and in like manner
 where they pray to be received to defend
 their Term, and one of them after makes

Default,

Default, it shall not be the Default of all, but the rest; or he, if it be but one who appears, shall be received to uphold the defence of the Term.

Thirdly, so where they plead a Release to the Testator or themselves, one after making Default; this shall not be nor make a total Default in the Executors, to induce a Judgment or Condemnation against them. Yet in truth, each Executor hath the whole of the Testator's Goods and Chattels, be they real or personal, and each may sell or give the whole. One of them cannot give nor release to the other his Interest; and if he do, it is void, and he who releaseth shall still have as much Interest as he to whom he released, because each had the whole before. Upon this reason long since, where one of the two Executors released but his part of a Debt, it was held that the whole was discharged. And so, if one Executor grant his part of the Testator's goods, all passeth, and nothing is left to the other; for that each hath the whole, and there be no parts or moyeties between Executors. Therefore also, though a Lease for a thousand years of a thousand Acres of Land come to two

Exe-

21 E.3.12.
27 H.8.21,
22.

D. E.

C.

If an Horse
come to
four Execu-
tors, each
hath an
Horse, and
yet all four
have but
one.

- E. Executors or more, no Partition or Division can be made between them, because it is not between them as between joynt Lessees of Land, where each hath but a moyety in Interest, though Possession of or through the whole. Amidst Executors each hath the whole, and therefore if he grant his part, he grants the whole. But one Executor may demise or grant the moyety of the Land for the whole term, and so may the other doe; and this way they may settle in Friends or others trusted for them, a moyety for each, either in severall or undivided: but one of them cannot make a Lease to the other of any part, for he had the whole, nor can one sue the other as Executor. Yet if the Testator devise to one of his Executors all his Goods, after such Debts and Legacies satisfied, there, after those satisfied, the Executor may take the Goods, and maintain an Action of Trespasse against the other Executor, if he take them from him, and consequently an Action of *Detinere*, for keeping or detaining them: but this is as Legatee, his own assent perfecting the Legacy.

6 H. 7. 5.

The possession of one Executor is the pos-

possession of all the rest: so as if one appearing to a Suit, and the other making Default in whose hands all the goods be which are not administred, if, I say, here he that appears pleads that he hath nothing in his hands, this shall be found against him; for whatsoever any of the Co-executors hath he also hath, and is in his possession; and so shall the Creditor recover, and have Judgment to be satisfied out of the Testator's goods, as in his hands. And therefore if goods be taken from one, all may maintain an Action of Trespas thereupon; for the possession of one is the possession of all. But the possession of one shall not be so the possession of all, as to charge the other's own goods, whereof more elsewhere.

Where two Executors be made, the one making a Will and Executors, and dying, if the other die after Intestate; now shall not the Executor of him who first died be Executor to the first Testator, but he is dead Intestate, because the surviving Executor is so dead, and in him the Executorship was wholly and solely settled by the death of his fellow before him. So Administration *de bonis non admin.* shall be committed.

The

14 H.4.12.

Bro. 12.

F.

All must

sue. 19 H.6.

65. Cont. 24

E.3.40. &

42 E.3.26.

It may be in

his name

only from

whom ta-

ken, nor

need he be

named Exe-

cutor. Bro.

Exec. 31.

39 H.6.45.

F.

G.

32 H.8. Bro.

Exec. 149.

39 H.6.45.

Co. 9. lib. 5. f. 97.

H.

Chapman &
Dalton's
Case. Plow.

Sir Edward
Pbinton's
Case, Co. lib.
2. f. 80.

A.

So where
the Stat. of
W. 1. gives
time for
proof to
him whose
goods were
wrested, his
Executors
may doe it,
if he die be-
fore the
time.

Co. 1. 5. 137.
b. Co. lib. 6.
f. 80.

The Executors, or Executor, if but one, so represents the person of his Testator, that he is in Law his Assignee by the very making of him Executor: so as if one Covenant to make a Lease to *J S* and his Assigns by such a time, and *J S* dieth before that time, and before the Lease made; now must the Lease be made to his Executors as his Assignees, representing his person: so also in a condition to pay the Feoffor or his Assignee: yet a Lease to *A* and his Assigns during the life of *B* shall not go to the Executors of *A*. So where in a general Pardon by Parliament there is an exception of persons Outlawed after Judgment, the person so outlawed shall satisfie the Creditor who hath outlawed him. If the Outlaw die before this done, his Executor, as representing his person, may make satisfaction, and so make the benefit of the Pardon to extend to his Testator, for saving his goods, as if himself had satisfied his Creditor, though he left him unsatisfied when he left the World, & *diem obiit extremum*. Yet where *A* sold Land to *B* upon *Proviso*, that if he payed to *B*, his Heirs or Assigns, &c. *B* died, *A* payed at the day to his Executor,

tor; and it was doubted that it was not good; for the word Assignee could not reach to him, being no Assignee of the Land. And where the Executor brought an Action of Account upon a Receipt by the hands of the Testator, the Defendant could not be admitted to wage his Law; for that this was held a Receipt *per auter mains*: yet it is clear, that if one by Bond or Covenant tie himself to pay such a sum at such a day, not mentioning his Executor at all; yet is the Executor bound, as included in the name or person of the Testator. And where the Statute 23 of *Hen. 8.* gives the Writ of Attaint (in the course there mentioned) against the party that had Judgment, it lieth against his Executors, if he be dead; but thereof another reason is given. Where a man was bound that he would not sue upon such a Bond, and he died, and his Executor sued; this was held to be no Forfeiture of the Bond. So where one was bound to pay ten pound within a moneth after request made to him, and he died before request; it sufficed not to make it to the Executor, as *Manwood* said. It was likewise held, that the Warrant of Attorney put in for the

Also Executors may have restitution for stolen goods, and a Writ of Error; yet the Statute speaks but of the party.

A.

2 *El. Dy.*
180. *Cont.*
where to A
the Feoffor,
his Heir or
Assign.
Co. lib. 3. f.
97. 2 *Eliz.*
Dy. 183.
3 *Eliz. Dy.*
201.

Hi.

25 *H.8.16.*

M.15 & 16
Eliz.

L

Plain-

L.
 34 *Eliz. vel
 extiter, Fi-
 therly &
 Executor.
 Wall. in
 447. Reg.*
 1.
 36 H. 8.
 89. Stat.
 Merchant
 42.
 K.
 2 R. 3. 8.
 H. 1.
 15 H. 3. 14.
 R.
 15 E. 3. Re-
 stituti. com.
 upon a Stat.
 Merchant.

K.
 Com. Nat.
 br. 267. up-
 on a Recog.
 I.

H.
 30 El. rot.
 31. in 61.
 Reg.

Plaintiff in Debt, it sufficeth not for his Executor to bring a *Scire facias* upon the Judgment. And if Executors sue Execution upon a Statute in the name of a Conusee, as if he were alive, this is void, and they may sue out new Extent; and this they may doe without any *Scire facias*, as well as the Conusee might if he had been alive. But by *Huffey*, Justice, If the Conusor in a Statute-staple be returned dead by the Sheriff upon the Extent, a *Scire facias* must be sued out before Extent proceed; and upon a Judgment had, if the Recoverer die before Execution, his Executor cannot, as himself might, sue out Execution without a *Scire facias*, as is there said. Yet if after a *Capias ad Sat.* awarded, the Plaintiff die before it be executed, the Sheriff may proceed to the taking of the party, and is not subject to any Action of false Imprisonment: nay, if he suffer him to escape, he is chargeable, as *temp. Elizabeth*. it was resolved upon the motion of *Anderson*; but withall it was held, that relief might be by *Audita Querela*.

Like Resolution was in the King's Bench, after some doubt by *Way* and the other Judges, where the Defendant died after

after a *Pieri facias* awarded, and before it was executed; that the Sheriff might proceed upon the Goods in the hands of the Executors.

But if the Defendant in an Action of Debt upon a Bond plead a Tender at the time and place of payment, and tenders the money in Court, where it rests, and then he dies; now shall not the Plaintiff have this money, because the property thereof is changed, and become the Executor's, as was held in the *Common Pleas*; but he is put to a new Suit against the Executor.

Yet where Judgment is once given in a Writ of Partition for a Termor, or in a Writ of Account; if the Plaintiff die before the second Judgment needfull in both cases, the Executor is not put to a new Suit, but may proceed by *Scire facias* upon the former Judgment: as the *L. Anderson* held, upon the motion of *Fenner*, Sergeant. Though before we found the Executor not in points penal all one with the Testator; yet in point beneficial the Testator includes him in some Cases; as where an Abbot granted to his Lessee to take Estovers in another's ground, it was held that his Executor, though

32 El. vel
circiter.

I.
Pasch. 28.
H.

not named, should enjoy this during the term, as well as himself should have done. And whereas the Statute 23. of Henry the 8. gives Costs to a Defendant against a Plaintiff suing for a wrong, or breach of promise, or the like, done to the Plaintiff, against whom it passeth by Verdict or Non-suit; it hath been resolved, that an Executor suing upon such wrong, or breach of Contract to his Testator made, should not pay Costs, because he is another person then the Testator; and so is it usual in experience. But if in Suit the Attorney of the Executor misbehave himself towards him, and for this the Executor sueth him; here, if it pass against him in manner as aforesaid, he shall pay Costs, because this was a Suit for a wrong done to himself.

*Trin. 36 El.
in ba. Reg.
H. M.*

*Pa. 41 Eliz.
in com. ba.*

*H.
38 H. 8.*

If *A* recover a Debt as Executor of *J S*, and makes *B* his Executor, and dies before Execution sued; *B* is not put to new Suit, but may have Execution upon that Judgment. But if *A* or *B* died Intestate, now could none as Administrator to either of them, nor as Administrator of *J S*, have Execution of this Judgment; for the former hath no interest in

in any thing pertaining to *J S*, and the latter cometh to Title above the Judgment, viz. as immediate Administrator to *J S*, who is now dead Intestate, and derives no Title from the Executor who recovered.

If a Conusee have a Certificate into the *Chancery* upon a Statute, and then dies before Extent taken out; his Executor is put to a new Certificate, and for obtaining of it must make *Affidavit* that no Extent hath yet been taken out.

² *El. Dy.*
180.
I.

If an Alien joyn with his Wife who is Executor in a Suit for Debt, and it cometh to Issue, he shall not have Trial *per medietatem alienig.* or *Lingua*, as should be if he otherwise were party to a Trial; as was held in the Case of Doctor *Julio*. Yet if a Nobleman sue as Executor to another not noble, he shall for his Non-suit be amerced five pound, as if he sued in his own right; as was conceived 21 *E. 4. 77*. By the same rule and reason, doubtless, a Nobleman sued as Executor shall not be arrested, nor shall any *Capias* be awarded against him for not appearing. And if any Trial shall be of any Issue, there shall be two Knights

M.

of the Jury, as in other Cases where a Peer is party. Likewise where the Wife is to have her convenient Apparel, whereof the Executor must not bereave her; if she be a Noble-woman, it shall be answerable to her degree.

A. If one Executor onely sell Goods of
38 E. 3. fo. 9. the Testator, he alone may maintain an
N. Action of Debt for the money. So if Goods be taken out of the possession of one Executor, he alone may maintain an Action, and that without naming himself Executor.

P. Some touch hath been before of Sum-
O. mons and Severance, whereabout be
3 H. 7. I. this added: If one Executor will not
& 5 E. 2. or cannot conjoyn in Suit with the other, so as he is summoned and severed; now by his death after the Suit is not abated,
Fitz. pro 16 Ed. 2. Fitz. III. Yet if he live till
802. Cont. Judgment, he may sue Execution, say o-
38 E. 3. 13. ther Books, 13 Ed. 3. Fitz. Exec. 9. 11
& 20 E. 3. R. 2. Privilege 2. Yet *Quer.* of that, for
tit. Account he cannot acknowledge satisfaction, as
78. hath been since resolved. *Mich.* 14. & 15
Eliz. Dy. 319. And the reason thereof being, because he is no party to the Judgment, by the same reason can he not sue Execution upon it; for how can he

he have Execution, for whom there is no Judgment given? now the Recovery is onely in the name of the other Executor. Yea, by the said last Book it seems that after Judgment had he cannot release the Debt, because it is now altered in nature, and turned *in rem judicatum*; though at any time before Judgment he might have released it, as both that last Book saith, and the two precedent, *temp. Ed. 3. Rich. 2.* Yea, in an Action of Account, after Judgment had that the Defendant shall account, the Release of him severed is a good Discharge to the Defendant; as was resolved *48 Ed. 3. 14, 15.* But this is not a plenary Judgment, for nothing is recovered thereby; but another Judgment is to be had after the Account, which may be against the Plaintiff, so as this Release came before any Debt or Duty adjudged. What if the Defendant be had in Execution at the Suit of the Executor, who prosecutes it and escapeth? whether may the severed Executor discharge the Sheriff or Gaoler by a Release? I think he may not.

By that above it is plain, that if any one of the Executors Plaintiffs die, the

2 H.4.f.14.

P.
9 E.4.12.
Bro. 34.

Writ is abated; onely where he so dying was before severed, Opinions have been different, as above appears. So also is it if one of the Defendants Executors die. Yea, if the Plaintiff Creditor sue *A, B, and C*, as Executors, where onely *A* and *B* are Executors, there by the death of *C* the Writ abates, or falls to the ground: yet *A* and *B* (as I think) might have pleaded in Abatement, that they onely were Executors, traversing that *C* was not Executor: but the Book doth not so resolve. See 46 Eliz. 3. fol. 9, 10.

A.

As *A* and *B* above might admit that Writ against them and *C*; so if the Writ or Suit had been against *A* onely, and he so admit it, not pleading in Abatement, the Recovery against him alone is good, 9 E. 4. 12.

21 H.6.30.
M.21 E.4.49.
69. 42 E 4.
13. 14 H. 6.
14, 15,

One that is Out-lawed, or Attainted in his own person, may yet sue as Executor, because this Suit is in another's right, viz. the Testator's: But he that is Excommunicate cannot proceed in Suit as Executor, because none can converse with him without being excommunicate, as a Book says. Yet doth not this Excommunication pleaded abate or overthrow the Suit,

Suit, but make that the Defendant may stay from answering his Suit untill the Plaintiff be absolved and discharged from his Excommunication.

3 H.6.40.
Littl. 44.
Co. L. 81.69.
11 R. 2.
Excom, 25.

CHAP. X.

Of the Possession of Executors, or their actual Having.

1. *What shall be said so to come to their hands as to charge them.*
2. *What shall be such a getting or going from them as to excuse them.*

VVE have before considered what things shall come to Executors, and, being come, shall be *Assets* in their hands. Now, for that it is said in *Reede's Case*, that an Executor shall not be charged with or in respect of any other goods then those which come to his hands after his taking upon him the charge of the Executorship; let us now examine what shall be said and accounted such a full and compleat coming to the hands of Executors, as shall make them within the reach

Co. lib. 5.

reach and charge of Creditors and Legatees, viz. for the payment of Debts and Legacies. As touching Debts due to the Testator, it hath before been shewed, that untill Judgment and Execution had they be not *Assets* in the Executor's hands. Now then as touching other Goods or Chattels possessory, which are of two kinds, viz. real and personal, let us put the case thus.

The Testator at the time of his death hath a flock of Sheep in *Cumberland*, Corn in the Barn in *Cornwall*, Bullocks in *Wales*, fat Oxen in *Buck. shire*, Money, Household-stuff and Plate in *London*, a Lease for years in *Norfolk*, and his Executor dwells at *Coventry*, viz. far from all these places; what kind of Possession shall the Law judge this Executor to have in every of these instantly upon the Testator's death, and before he come where any of the things be, either to see or seise upon them? In all the particulars above mentioned the Law is all one, except the Case of the Lease for years; which if it be of Land, (as is most usual) then, because it is a settled and immoveable thing, the Law doth not reach to it the foot of the Executor, to put.

put him in actual possession, (for *possessio est quasi pedis positio*) untill himself or some for him do actually enter thereupon. Nor indeed need the Law help or supply the want of actual possession in this Case, as in the case of Moveables; since Land cannot be carried away as Goods may, and therefore is not subject to purloynage or imbesilment as Moveables are. But if the Lease for years were of Tithes, the Executor, though in never so remote a place from them, shall be instantly upon the setting out thereof in actual possession of them, so as he may maintain an Action of Trespasse against any Stranger which shall take the Tithes set out, though he nor any for him did ever before possess any of the said Tithes, or came near unto them. But if the Case were of a Lease for years of a Rectory, consisting not onely of Tithes, but also of Glebe-lands, into which Entry may be made, as also Livery of seisin in it; then it may perhaps be some question, whether such an actual possession in Tithes shall be given by the Law to an Executor neglecting to enter, or not entering into the Glebe-land. And so I leave the consideration of Chattels real.

45 E.3.17.
21 H.6.43.

Touch-

9 E. 4. 50.
 Plow. Com.
 281.

32 H. 6. 13.

14 H. 8. 22.

Touching things Personal, in which the Executor hath such an actual possession presently upon the Testator's death as that he may maintain an Action of Trespasse against any Stranger taking them away, or spoiling them, though he nor any for him ever came near them; whether yet this shall be such a possession in the Executors, and such a coming of these Goods to their hands, as to charge them with payment of Debts and Legacies, yea to make their own Goods liable in stead of these, is a Point worthy of consideration.

And, doubtless, this thoroughly sifted will prove a Case mischievous, whitherway soever the Law be taken. For first, it must be admitted, that without the Executor's laying his hands actually and particularly upon the Goods in the House or Fields of the Testator, whether the Executor hath resorted, he shall be said so in possession as to stand liable unto the Creditors, so far as they extend in value, though after others purloyn or imbesil them. Now then, if distance of place shall make difference, where shall be the bound and limit of that distance? and if the Executor may come
 after

after a Stranger's taking or possessing of the Goods, it is mischievous to Creditors.

On the other side, if it shall be laid upon the Executors to answer for all the Goods whereof the Testator died possessed, it will be mischievous for them, and deterr them from taking Executorship upon them; since much purloynning may be even of Money, Jewels and Goods, by Servants and others about the Testator, or where these things be. I think therefore, that if without any fraud, collusion, or voluntary conniving on the part of the Executors, they be prevented by others of laying hold on the Testator's Goods, so as that they may dispose of them, especially if it cannot be known by whom they are so purloyned and imbefilled, or if they be persons fled or insolvent; that then they shall not stand upon their score, as Goods come to their hands, in respect whereof Creditors or Legatees shall draw so much from them even out of their own Goods, as in other Cases where they have no such excuse.

And of this mind I the rather am, because I finde the whole Realm in Parliament

13 H.6.c.1. liament taking notice of such prevention of Executors coming to the Goods of their Testator, by the wrongfull act and imbesilment of others, without any default in themselves. And in this Case the Parliament hath given special remedy, viz. that Writs shall be directed to Sheriffs, to make open Proclamation for the appearance of the parties delinquent in the *King's Bench* at the day limited; and in default thereof they shall be attainted thereof Felony, the Writ being returned executed, viz. Proclamation made. But note, that this Proclamation is to be made two Market-days, within twelve days next after the delivery of the Writ, and the last Proclamation must be fifteen days before the day of Appearance. And these Proclamations must be made in such Cities, Boroughs, or Places, (saith the Statute) not expressing what is meant by the word *such*, and therefore meaning doubtless those in which the act of offence is committed. So that if the fact be not committed within the limits of some City, Borough, or Market-Town, no remedy is to be had by the Statute; for that the Proclamation is to be made upon Market-days in the place where,

etc.

&c. Now besides other Places, even some Boroughs, *viz.* Towns sending Burgesſes to the Parliament, have no Markets, and ſo are no places within the Act. Alſo two Executors muſt require this Writ; therefore where there is but one Executor, no relief is given by this Law, for it is penal, making Felony, and therefore ſhall not be extended by equity beyond the words. Laſtly, it extends but to the Executors of Lords and perſons of good Degree, and onely to the treſpaſſing Servants of ſuch perſons, not to other Strangers, purloyning the goods. But now who ſhall be ſaid to be perſons of good Degree, not being Lords, I will not much labour to decide; the rather, becauſe I have not heard nor read, to my remembrance, of any Action brought upon this Statute: but I think that good Degree muſt ſtay either at a Knight, being the loweſt Dignity, or at a Gentleman, being a degree of Worſhip, as elſewhere is ſhewed, and not ſtop any lower.

And the ſaid Statute ſeems in ſome ſort to imply an opinion this way which I incline to, in that it expreſſeth this purloyning to be an impediment of the Execution

cution of the Will, whereas if the Executors shall answer and make good to Creditors and Legatees out of their own state and goods, for these imbefilled, the Execution of the Will is not hindered, but the Executors are damnified in their own private value. Yet it may be said, on the other side, that some things given *in specie* by the Will, such a piece of Plate, such a furniture of a Bed or Chamber, such a Jewel, may be purloyned, so that the Legatees can never have them, and consequently, the Execution of the Will be hindered, though some recompence be made by the Executors: but how these Legatees shall recover recompence in such Cases, for that Legacies are not to be recovered by Suit at the Common Law, I must leave to the Professors of the Common or Civil Law to inform. But if the Executor be of secret assent to this imbefilment, whereof even the forbearance to sue for the recovery of the things, or the value of them in damages, if known where they or the imbefillers be, is a shrewd evidence, or proof; then shall the Executor be adjudged an haver of them, and so stand charged as having them: for *Pro possessore habetur qui dolo*

dolo desit possidere. And if in any Case the taker by prevention from the Executor, before his knowledge (perhaps) of the Testator's death , or, at least, before his possibility of repair to the place where the goods were, to put them in sure custody, if, I say, such Actor keep these goods from falling upon the shoulders of the Executor, they shall surely fall upon himself, and make him chargeable at the Creditor's Suit, as an Executor of his own wrong.

Of Goods lost by or gotten from Executors.

But put we the case (for thereunto shall be our next step) that Goods come fully into Executors possession and hands, but be again lost or gotten from them without any default in them, shall they yet stand answerable out of their own Estates for them? Surely hereabout two distinctions must be made, as I take it.

The first whereof I derive from our Learning touching Escapes of persons taken in Execution and imprisoned, if such ^{33 H.6.1.} be rescued by Alien enemies, the Sheriff or Gaoler shall not answer out of ^{10 E. 4.2,3. 7 Eliz. Dyer 241.} his own goods for this Debt, otherwise,

M

if

if it be done by Subjects, against whom remedy is to be had by the course of Justice : and so should I think it to be touching Executors, *viz.* That if enemies landing (as near the Sea-coast may easily and often happen) shall take away Cattel or Goods from an Executor, hereby he shall be excused; contrariwise ordinarily, if the ereption or direption be by Subjects known, and thereby actionable. Another difference I shall think may probably be taken from the rules of our Learning touching Bailment. If *A* deliver Goods to *B* to keep as his own, or generally, *viz.* without any special undertaking by *B*, to keep them safely, and without any money or other valuable consideration given for the safe custody : here, if *B* be robbed of them, he shall not make satisfaction to *A* for them : and so if they be stoln from a Servant or Factor. But if they be taken away by a known Trespasser, not feloniously, some opinion hath been that the Keeper shall make recompence, because he hath remedy for recompence, or satisfaction from the Trespasser. Yet of this latter I should doubt, because *A* himself as well as *B* may have this Acti-

on

Vide 29 Aff.
p. 28. 8 E. 2.
Fitz. Detin.
59. 9 E. 4.
90. 13 H. 7.
4. Co. lib. 4.
fol. 83, 84.

on for damages against the Trespasser. Now an Executor is of the nature of such an one, having the custody of another man's goods; and I have seen in a Manuscript entire, the Writ of Trespass by the Executor, expressing goods of the Testator in the custody of the Executor to be taken from him: therefore methinks he should no otherwise be charged then *B*, to whom goods were, as above is said, delivered to be kept. For the Executor haply shall have no benefit nor advantage by the Executorship: all the Goods not sufficing, perhaps, to pay Debts and Legacies, which is the state we most think of, *viz.* where goods want to pay Debts and Legacies; for where there wants not, the question needs not be made. Yet a Servant or Factor, who hath Wages for his Service, is not thereby made liable to satisfy for things in his custody stoln, because he hath not for this particular custody any compensation. So of an Executor, if perhaps benefit might accrue to him by the Executorship, as haply the discharge of a Debt owing by himself, &c. Other Cases there be wherein the Executor will stand more clearly discharged. As

*In custodia
sua existit*

if the Testator left a Lease for years, state by Extent, Wardship, or other Goods, whereto he had but a defeasible Title, and they be evicted after his death: so if he left a ship at the Sea with much Goods and Merchandises, which are drowned in the return, never arriving in safety: so also if he left a flock of Sheep tainted with the rot, which die shortly after him: In none of these three Cases, doubtless, shall the loss fall upon the Executor. But to put a Case of more doubt; What if a Lease for years come to an Executor subject to a Condition for payment of Rent, or a sum in gross, and the Executor fails in payment; whether shall this loss fall upon the Executor to be made good to Creditors or Legatees out of his own substance, or not?

To this I must answer by this distinction, *viz.* If the Executor had taken the profits of this Land so long as to furnish him with money for this payment, or if he had other goods of his Testator's in his hands to supply the payment, then is it his default that the money is not paid, and he must bear the smart thereof, ctherwise not; for he is not bound to make payment out of his own goods: yet he is
a ful-

a sullen and unkind Executor who will not so doe, whenas he may repay and satisfie himself by the profits thereof after. Yet *Quare.*
Like Law, if the Executor suffer a Bond of a hundred pound to be forfeit for not paying of fifty pound, having sufficient in his hands. So also of a Recognizance, Statute or Judgment, defeasanzed upon payment of a lesse sum. Yea, I lesse doubt of all these cases, then of the Forfeiture of the Lease for years : for haply the Executor had time to have sold the Lease, and made money thereof, towards the payment of Debts ; the omission and neglect whereof may be imputed unto him, as a Default justly occasioning recompence to be by the Law required from him. But, perhaps, he may excuse himself that he could not find a Chapman who would give him to the value thereof. Hereunto yet reason can easily reply, that it had been much better to have sold it under the value, then to have lost the whole value, by exposing or abandoning it to a total Forfeiture.

CHAP. XI.

How far and where an Executor, having Assets, is chargeable or liable to Action.

HAVING considered what things shall come to Executors, and be *Assets* in their hands for the performance of the Will; let us now consider what things the Executor is bound to pay, satisfy, or perform, and what not, where he is chargeable, and where not, this being admitted, that he hath *Assets*, viz. sufficient wherewith to perform.

Here we will consider of these parts.

1. *Of Debts by Specialty or Record.*
- 2. *Of Debts or Duties by Contract without Specialty.*
3. *Debts without either Contract or Specialty.*
4. *Covenants by Deed or Specialty.*
5. *Wrongs done by the Testators.*

TOUCHING Debts by Specialty, which are the most usual and common oblige-

obligements, it will not be impertinent to give a little light touching the validity of a Specialty, and the extent of it to Executors. The most doubt will arise upon Bills and such Writings Obligatory made, not by Scriveners or Clerks, in common form, but by others otherwise, for haste, or through simplicity. Thus, long since we finde a Writing made by *A* to *B*, *Memorand.* that I have received of *B* ten pound, which I promise to pay, &c. This being sealed and delivered, was held a good Obligation by *Brian* and *Catesb.* So if the words had been onely, I shall pay to *B* ten pound; whether such words, or the like, as covenant or grant to pay, be in the form of a Bill or Bond, or in an Indenture or Articles, it is a sufficient ground for an Action of Debt. And though it should be mis-written, *Wigint* for *Vigint*, or fifteen for fifteen; yet shall it be favourably construed, and held a good Specialty of Debt, as hath been resolved in these and like Cases, and so also notwithstanding false *Latine* in the Obligation, or the plural number for the singular number, or words of repugnancy or non-sense; yet if there be words whereby it appears

22 E. 4. 22.

19 R. 2. F.
Det. 166.9 H. 6. 7.
2 H. 4. 8.

23 El. M. 5.

9 H. 7. 16.
2 H. 4. 8.

28 H. 8.
Dyer 22.

28 H. 8. Dy.

19 & 22.

40 E. 3. 1.

7 H. 7. 14.

8 H. 6. 36.

22 H. 6. 15.

21 E. 4. 81.

3 H. 4. 17.

11 H. 4. 76.

that *A* is a Debtor to *B*, and it be sealed and delivered, it is a good Writing Obligatory; yea, though it want the words of conclusion, *viz.* *In witness whereof*, as the Lord *Dyer* reports to have been resolved; although the contrary were held in four several Kings times before, as our Books shew.

Now any such Writing obligatory doth determine or drown any Duty by Contract, because Specialty is of a higher nature. So as if *A* and *B* do bargain with *C* to pay him a hundred pound for Corn, or other thing, and after *C* take some such Writing obligatory as aforesaid of *A*; now by this is *B* discharged of the Debt, because he stood charged onely by the Contract, which is extinguished by the said Specialty.

As for the extent and operation of these Specialties to and upon Executors, we must know that an Executor doth so represent the person of that Testator, and is so included in him, as that every Bond or Covenant by the Testator, made for payment of money or the like, reacheth to the Executor, although he be not named, *viz.* that he doth not Covenant for, nor bind him and his

Ex-

So reservation of Rent,
grant of Annuity.

28 H. 8.

Dy. 14, & 22.

47 E. 3. 22.

32 H. 6. 32.

10 H. 7. 18.

Executors by exprefs words, (and yet the Heir not named is not bound, though there be never fo great *Assets* or Land descend unto him.)

No mention of Executor in the Judgment, yet he charged.

Now touching Debts upon Record much need not to be faid, (except of thofe by Stat.Merchant:) for to Debts and Dammages already recovered againft the Teftator, and to Debts by Recognizance, the Executor's liablenefs is fomewhat clear and conspicuous. Yet other inferiour Debts upon Record may fitly be thought of, as Iflues forfeited, Fines impofed by Juftices at *Westm.* or at Affifes, Quarter-Seffions, Comiffions of Sewers, or Bankrupts, by Stewards in Leets, or the like; for all thefe are Debts of Record, which Executors ftand charged withall. So alfo if the Teftator were before Auditors found in Arrerages of Account, being a Bailiff or Receiver; for thefe Auditors are by Statute Judges of Record: but if the Account were made onely before the party to whom the Arrerage pertained, or but before one Auditor onely, it is out of the Statute, which fpeaks of Accounts before Auditors in the plural number; therefore the Executor not chargeable, becaufe
the

9 H.6.f.11.

11 H.4.64.

52. Other-

wife of a

Gardian in

Socage, he

is out of the

Stat. W.

2 cap. 11.

ut credo. Co.

1. 10. 103.

the Testator might wage his Law in those Cases, not in the former.

36 H.8. Br.
Stat. Mer.
43.

And whereas exception was before made of a Debt by Statute-Merchant, it was by reason that the Lord *Brook* tells us, that if the Conusor in that case be returned dead, no remedy appeareth for the Conusee to have Execution of the goods of the Conusor, but onely of his Lands. If this should be thus, it were a very mischievous Case: for many bound in Statutes have no Lands but Leases, and Goods of great value, and if by their death their Goods and Chattels should be set free from this Statute, and the Creditor without remedy, the Law were defective: and it were so much the more strange in this Case, because the Statutes of *Alton Burnell* and *Mercatoribus* seem to pitch principally upon Goods, and to tend unto assurance between Merchants, who usually are not Landed men. But that the Law doth give remedy in such Case, as well against the Goods as Lands of the deceased Conusor, appears by the Resolution of late made, in what Order and Precedence Statutes are to be satisfied by Executors, as after we shall see.

*Of Debts by Contract without Deed, as
Leases parol, &c.*

Contracts are of divers kinds, and we will begin with those in the re-
alty, as most worthy. If therefore one be
Lessee for years or for life, without any
Indenture or Deed, (as he may be) and,
his Rent being behind, he dieth; now is
the Executor liable to the payment of
this Rent without any Specialty, for that
his Testator, if he had been sued in his
life-time, could not have Waged his
Law. But if the Lessee for years in his
life-time sell or grant away his Term or
Lease, although he still lie at the stake for
the Rent to grow due after, untill the
Lessor accept the Assignee for his Te-
nant; yet if the Lessee die, his Execu-
tor shall not be charged for any Rent due
after the death of his Testator. But
what if the Lessee do not alien or assign
his Term, but die thereof possessed, and
the Executor, perceiving the Land not to
be worth the Rent, waveth the same,
yet the Lessor will not enter thereinto,
nor intermeddle therewith, whether may
he yet charge the Executor with the
Rent

21 H. 6. 1.

44 E. 3. 42.

44 E. 3. 5.

7 E. 3. 11.

14 H. 7. 4.

per Keble.

Vide 8 E.

Dy. 247.

M. 32. &

33 Eliz. in

com. ba.

Do. & Stud.

121.

Rent during the Term? I answer, that if he have *Assets*, that is, sufficient for payment of this and other Debts, he cannot wave this Lease, but shall be tied to answer this Rent, though much more then the Land is worth, for the taking of the Lease is much of the nature of an Obligation to pay money: Yet because it is yearly Executory, the Executor may wave it, in case his Testator's Estate will not supply and bear that losse. But what if there be *Assets* to bear this yearly loss for some years, but not during the whole term? I think in this case the Executor must pay the Rent so long as these *Assets* will hold out, and then must wave the possession, giving notice to the Reversioner. And this I think he may doe well enough, notwithstanding his Occupation of the Land divers years after the Testator's death, because that was not voluntary, but as of necessity: yet this I leave as a *Quere*, to be well advised of with good counsel.

Of Contracts personal.

WHere the Testator might wage his Law, there the Action lieth not against

against the Executor, as hath been touched: and therefore he is not chargeable in an Action of Debt upon a simple Contract, as by reason of this or that, to his Testator; yea, though it were the Inheritance of Land which was sold, so as the Sale were without Deed; or though by Deed, yet if no Counterpart were under the hand of him to whom the Sale was made. And the Custom of *London* to the contrary, *viz.* that an Action of Debt should be maintained against Executors upon a Contract, was held void, at least no good Plea against other Creditors, that such a Debt was recovered against the Executor, or paid by him; as was towards the latter end of the late Queen's time resolved, though in the beginning of her time it was a Demurrer. Yea, though such a Debt grew for the most necessary thing, *viz.* meat and drink, which bindeth even an Infant to payment, yet will it not charge the Executor of a man of full age. But this is meant where the Contract was onely by word: for where the Testator putteth his Seal to any Deed or Writing made upon such Sale, this is more then a simple Contract, and taketh from the Vendee his wager of Law, and so chargeth the

41 E. 3. 13.
15 E. 4. 25.
Except by a
Quo minus
in the Ex-
chequer. So
the Dug's
Debter. Co.
l. 9. f. 98. a.
So of Ac-
counts, ex-
cept for the
King.

M. 32. 6.
33 El. in
com. ba. by
three Judg-
es, and 37
El. by all,
as I find in
my Report.
But Co. l. 5.
f. 82. b. it is
contrarily
reported.
3 El. Dy.
196. De-
murrer.
9 E. 4. 51.
10 H. 7. 8.
15 E. 4. 16.
22 H. 6. 13.
39 H. 6. 186.

There
though a
common
Hostler or
Vittualler
trust his
Guest, he lo-
seth his Debt
by his death.
Co. 9. 87. b.
12 H. 4. 23.
But if the
sum be also
written on
it, they are
bound as by
a Deed.
28 H. 8.
Dy. 2. a.
Slade's Case.
Co. lib. 4.
Co. 9. 87.
Pinchon's
Case.

2 H. 4. 14.

the Executor. But if the Testator seal but unto a Tail or Tally with scotches, expressing a Debt, this is no such Specialty as shall charge Executors. Yet in some Cases without any Seal at all the Executor is chargeable. But although no action of Debt lieth against the Executor upon such a simple Contract, yet may the Creditor in that case maintain an Action upon the Case, grounded upon the Assumption implied, though not expressed, as now standeth resolved by all the Judges of all the Courts at *Westminster*, though heretofore there hath been much difference of opinion thereabout. And indeed, thus the Executor is charged in matter for a simple Contract, though not in manner of a Debt, but as for breach of promise, making recompence in Damages, in stead of the Debt. And the chief reason for it is, because the Testator could not have waged his Law in this Action upon the Case against himself, though in Debt he might. Where the Testator retaineth Servants in Husbandry, or otherwise, and dieth, there being Wages due to these so retained; the Executor is liable to an Action of Debt for the same,
by

by reason that the parties were compellable by Statute thus to serve, and therefore the Testator could not have waged his Law : but in case of Servants not compellable, as Waiters or Serving-men, as we call them, no Action of Debt lieth against the Executor for their wages, though against the Testator himself it doth; for the Contract is sufficient to charge him who made it. See of *Account* after.

4 H. 6. 48.

So 2 H. 4. f.
14. Servitors
in the War
by Contract.

Where Executors shall be charged, without either Contract or Specialty.

WHERE a Prisoner oweth money to a Gaoler or Keeper of Prison for his Diet or Victuals, and dieth, his Executors shall be chargeable for this Debt, because it is for the Commonwealth to have Prisoners kept, which cannot be without affording them Victuals. Also where one hath a Patent or Tally of the Exchequer, to receive money of some Customer, Receiver, or other Officer of the Crown, and delivereth it to him, he then having money of the King's in his hands; if he pay not the same, but die, his Executors shall stand char-

27. H. 6. 4.
15 E. 4. 16.
Co. lib. 9. f.
87. b.
No. n. br.
121. a. He
must have a
Liberate
also.

27 H.6.4. b.
1 H.7.17.
2 H.7.8. b.
Clark of the
Hamper.
10 H.6.24,
25.

No. na. br.
82, 83.
Westmin. 1.
c. 35.
Lib. Intr.
172. b.

Reg. orig.
141.

11 R.2.16.
P. 2.

chargeable with the payment thereof. So for Arrerages of Account before Auditors, if more then one ; but this is Debt of Record in Law.

So if any Lord of free Tenants doth levy Aid of them for the marriage of his eldest Daughter , and he die before she be married ; she may recover this money by an Action of Debt against his Executor: but this is by virtue of a Statute. There is a President in the Book of Entries, of an Action of Debt against the Executor of an Heir , by which it seems that a man binding himself and his Heirs , and leaving *Assets* , the Heir taking the profit becomes so a Debtor , that his Executor shall be charged. And in the Register there is a Writ against the Executors of the Guardian of the Spiritualties of the Arch-bishop of *York* , for the Debt of *B* , who died Intestate , and whose Goods came to the hand of the said Guardian, viz. the Dean of *York*. In allowance whereof, there is a Note added of the like Writ brought in K. R. 2, his time , and that then a President was alledged of such a Writ in King *Edw. 2*. his time against the Executors of an Ordinary, and that they were inforced to

to answer unto it. So is the opinion of *Tren*, in the time of *Edward* the third. 11 E.4. Fit. Ex. 77. See Co. lib. Intr. 564. Such Actions in York-shire.
 But *Ald.* opposeth him. Also the *Rationabili parte bonorum* by custome in some places is maintainable for the Wife and Children against the Executor. But no Action of Account lieth against Executors, except for the King. More hereof *tit. Wrong.*

Of Covenants charging Executors.

WE have already touched upon Covenants in part, *viz.* where they be expressly for payment of money, shewing them to be in Law-bonds, that is, Writings obligatory, whereupon an Action of Debt may be brought as well as an Action of Covenant, though the words of the Deed bear the sound and phrase of a Covenant. Yet in some Cases no Action of Debt lieth upon a Covenant to pay money: as if *A* covenant that his Executor shall within a year, or such a time, after his death pay ten pound to *B*; now for that no Action of Debt was maintainable against *A* himself, it lieth not against his Executor, but onely an Action of Covenant; as was held in the late Inter Andrews & Ellsrig, circa 33 El. Pasch. 33 El. inter Bor. & Austin, in com. b. a.

N

Queen's

Que. If both be to be done by the Covenanter, viz. ten l. if not five, such a day. So in *Penol's* Case. But where the Lessor did covenant to pay the Quit-rent, divers Justices thought the Executor, not named, was not bound, 1 & 2 F. & M. Dyer 114. Note the Case is *supra* in *marg. Pasch.* 25 El. in 6a. reg.

Queen's time. So if the Covenant be conditional, as thus, that if *C* do not pay to *B* ten pound, then *A* will pay it: and so also, perhaps, if the Covenant be in the distinctive, viz. to doe such an act, or to pay ten pound: now if the Act be not done, yet no Action of Debt lieth for the money, but onely an Action of Covenant. But now let us come to the Cases of meer Covenants, and see which of them will charge an Executor, and which not. If a Lessee for years covenants to repair the Buildings, or to pay the Quit-rents issuing out of the Land let, there is little doubt but the Executor, to whom the Term cometh, must as well as his Testator perform that Covenant, although he did not covenant for him and his Executors. And yet of these Cases doubt hath been: and touching the latter, viz. of paying Quit-rents, divers Justices in Queen *Mary's* time were of opinion, that it was a thing so personal, that it died with the person, and did not charge the Executors; nor is there any contrary Opinion expressed in the Book. And since that time, viz. towards the end of Queen *Elizabeth's* Reign, in the Action of Covenant between the Dean and Canons of *Windfor* and

and *Hide* touching Reparations, at the first much opinion was, that onely the person Covenanting was tied to this performance; but after it was resolved, that that Covenant did run with the Estate, and so both Executor and Assignee were bound to performance. But in that Case it was said by *Popham*, chief Justice, that if the Covenant had been to doe a collateral Act, neither the Executor nor the Assignee had been tied thereby: and therefore where a Lessee for years covenants within such a time to build a new House upon the Land, and dies before that time expired, I doubt whether the Executor be bound to perform this or not; although it do concern the Land let, so as perhaps the Rent or Fine was the less, in respect of this charge of new Structure or Buildings; which is a great reason that the Executor, though not named, should be tied to the performance. But if the Covenant had been to build a House elsewhere then upon the Land let, or to doe any other collateral thing, not pertinent to the Land let; it is clear the Executors were not bound to perform it. And yet in those Cases, if there were a breach or non-performance in the Testator's life-time,

Co. l. 3. f. 24.

Resolved
F. 39 *Eliza*
but not ad-
judged till
M. 43 & 44
Eliza

Tr. 28 H. 8.
 Dyer 14.
 There the
 House was
 to be built
 upon the
 Land leased;
 and yet Bal-
 dus seemed
 of a contra-
 ry opinion.

M. 8 & 9
 El. Dy. 257.
 Intrat. M. 7
 & 8 Eliz.
 Swanno
 Vest.
 Strangsham
 & Scarles.

as that the time of performance were expired before his death, then it is clear the Executors were bound to yield recompence by way of dammages recoverable in an Action of Covenant, as both *Shelley* and *Fitzherbert* agreed: and so also did the Lord *Popham* agree in the said Case of *Hide*, as I find in my own Report of that Case; though in the Lord *Coke*, reporting onely the Point in question, that be not mentioned. Now let us consider of the Case where there is no expresse Covenant at all, so much as for the Lessor himself, but onely a Covenant implied, or Covenant in Law, as we call it. As if Lessee for life make a Lease for years, and die within the term, so as the Lessee is evicted by him in Reversion or Remainder. In this Case it was resolved in the late Queen's time by three Justices, viz. *Walsh. Brown* and *Dyer*, that by this Covenant in Law the Executors were not chargeable; and in the same Case, the Lord *Dyer* sets down another Resolution after to the same effect. But Master Sergeant *Bendloes* reporting this latter Case to be of a Lease made by Tenant in Tail, viz. before the Statute of 32 H. 8. or not warrantable by it, sets down the opi-
 nion

nion contrarily, viz. that the Action was maintainable against the Executor. This may serve for instance, the like being in any other Case where the Lessor hath not a good and a firm Title, but perhaps subject to a Condition, or other Eviction, so as the Lessee cannot enjoy the Land according to his Lease.

Tr. 22 El.
rot. 459. in
ter Brode-
ridge &
Windfor.

But this must be so understood, that no eviction or breach of Covenant is in the life of the Testator himself; for if that be, there is no question but the Executor stands chargeable: and therefore if one make a Lease of Land by Deed wherein he hath nothing, this Covenant is perhaps presently broken; and though the Lessor die before an Action of Covenant brought, it will be maintainable against his Executor, though no express Covenant. This is usefull to be known, though in these days there be few Leases so made, without express Covenant, and the Executors also named. And where there is a special Covenant in express words, it doth qualifie the Covenant implied: so as although words of demise and grant tie the Lessor to a general Warranty of the Title against all men, yet it being after covenanted that the Lessee shall enjoy against the

Nokes and
Anders
Case.

Lessor and his Heirs , or against all claiming under him or his Ancestors ; now no eviction by or under any other Title giveth cause of Action, or bindeth the Lessor or his Executor to make recompence.

Of Wrongs done by Testators, and whether Executors be liable to Amends.

41 Aff. p. 15.
40 E. 3. Fitz.
Ex. 74. Co.
lib. 9. f. 87. d.

ALthough Executors do represent the persons of their Testators; yet if the Testator commit any Trespass upon the Goods of another, or upon his Person or Lands, no Action lieth for this against the Executor ; for *Actio personalis moritur cum persona*. So if a Sheriff, Gaoler or Keeper of Prison, suffer one in Execution for Debt or Damages to escape ; though hereby the party at whose Suit the Execution was be intitled to an Action, viz. an Action upon the Case, against such Officer by the Common Law, and by Statute an Action of Debt ; yet if he so suffering die, for that such difference was a wrong of the nature of a Trespass, no Action lieth against his Executor for the same. And upon the same reason, as I presume, if one carry away his Corn and Hay, without setting out the Tenth, although

though the treble value be recoverable against him in an Action of Debt ; yet if he die before such recovery , the Action is gone, and lieth not against his Executor ; no , not although the Testator were a Lessee for years, so as his State came to his Executor.

Like Law in other penal Statutes : as, for arresting one at the Suit of *J S*, without his privity or assent ; or for not appearing as a Witness, being served with a *Sub-pœna*, and having charges tendered, and many like ; yea, if a Lessee for years commit Waste and die , no Action lieth against the Executor for this Waste. For all these Cases are within the rule of *Actio personalis moritur cum persona*. And many other like Cases might be put , but these may suffice. Yet if a Parson, Vicar, or other Spiritual or Ecclesiastical person, do suffer a ruine or decay of the Houses or Buildings upon his such Spiritual Benefice or Promotion, and dieth ; his Executors are liable, by the Spiritual or Ecclesiastical Law , to the Successor's Suit for amends, to the repairing of such spoil or decay. And because some used fraudulently to grant away their Goods, so as nothing shall be left to their Executors ;

12 El.c.16.

it was enacted *temp. Elizabetha*, that such Grantees of Goods should be liable to the Successor's Suit for these Dilapidations, as if they were Executors.

As for one other Case of this nature, *viz.* where an Executor wasteth the Goods of his Testator, or an Administrator the Goods of his Intestate, and dieth, whether his Executor be subject to Action for this, or not; I adjourn the Reader to that place where I shall treat of such Wasting or Devastation by Executors.

Fitz. Ex. 77.

I conceive
no difference
between this
and the o-
ther Cases
supra.

Unto this Head not unfitly may be referred what before is said of Actions against the Executors of the Debtor's Heir, and the Executors of the Ordinary; for the Specialty binding to payment reacheth not to any of these: but because their Testators should have paid these Debts with the Goods or Profits of the Lands of the Debtor, and did not, but retained them to themselves; therefore for this, as a Wrong, are they suable, as I take it. So also by the same reason are the Executors of an Administrator chargeable, where he did neither pay the Debts, nor leave the Goods to the next Administrator, but otherwise disposed of them. Yet an Executor is not chargeable in an Action

ction of Detinue, nor of Account, (except to the King) for the Testator's detaining, and not paying or answering things received, or under his charge.

2 H. 4. 13.
He may by admit. Co. l.
11. f. 88.
3 H. 6. 35.
Con. for Arrerages of an Account before Auditors.
11 H. 5. 64.
91, 92.
9 H. 6. 11.
13 Ed. 1.

And the reason why, after Account made before Auditors, and the Bailiff or Receiver be found in Arrerages and die, that in this case his Executor is chargeable, is, because the Auditors are made Judges by the Statute *Westm. 2. cap. 11.* so this Arrerage which they have judged is a Debt by Record.

But if the Case be put on the other side, viz. that the Bailiff or Receiver have found in Surplusage upon his Account, viz. that he hath laid out more in his Lord's or Master's business than his Receipts amounted unto, and then his Lord or Master dieth; now shall not he have any Action against the Executors for the Surplusage, because it is out of the purview of the said Statute,

Co. lib. 9. f. 87. a.

CHAP.

CHAP. XII.

Of the Order and Method to be used by Executors in payment of Debts and Legacies, so as to escape a Devastation or charging of their own Goods.

WE have gone through and dispatched the two first proposed parts, viz. 1. Touching the being of Executors, and the manner of their being; 2. Their having, and the manner of their having. We come now to the third part, viz. Their doing or disposing of the Testator's Estate.

Now this consists principally in the issuing of Money, though partly also in delivering or assenting to the execution of Legacies, not being Money, but other Goods or Chattels bequeathed.

Money is to be issued by Executors four ways ordinarily.

About the Funeral of the Testator.

About proving his Will.

In paying of Debts.

In paying and satisfying of Legacies peculiarly.

As

As for the first, Burials be as of necessity for two respects, *viz.* 1. Of Charity to the dead, that he may be Christianly and seemingly interred; 2. to prevent and avoid annoiance to the living, who by the very view of the dead Carcasses would both be affrighted, and within a few days distasted at the nose. We know that under the Law the touching of a dead Carcass made a man unclean, and to need purifying: nor can we easily forget what the Sisters of *Lazarus* said to our Saviour touching their Brother, when he had been dead three or four days, *viz.* that the taking of him then out of his Grave must needs bring a noisome savour. Hereabout therefore some expence is necessary, and that not onely for Fees to be paid, which in *London* amounts to a considerable sum, specially for such as are to be buried within the Church; but also otherwise, *viz.* for the Pall or Herse-cloath, the Ringing, &c. As for Feasting and Banquetting, it seems not to be congruent to the sadness and dolefulness of the action in hand. But howsoever that be, yet where the Testator leaves not sufficient Goods to pay his Debts, Festival expence is to be forborn,

ex-

except the Executor will out of kindness bear it with his own purse ; for dead Debtors must not feast to make their living Creditors fast. I mentioned a considerable amount of funeral Fees payable in *London* : and surely (to let my thoughts fall back upon it a little) it is worth consideration, whether in that kinde, and especially for those who dying there are yet carried into their Countries to be buried, the Exaction be not either unjust altogether, or too onerously excessive : so also for much Ringing, contrary to the Canon made at the Convocation in the first year of King *James*.

The next thing mentioned to justify and occasion expence is the proving of the Will. But this way a greater disbursement (except for riding charges, or by reason of opposition by a *Caveat* put in, or the like) will not stand allowable, then is prescribed by the Statute made in the time of *Hen. 8.* whereby the Fees of Ordinaries, and their Scribes, Registers and Officers be limited. And it is strange that these bounds have been so much and so frequently broken and transgressed ; the rather, for that long before, in the time of *K. Edw. 3.* by an Act of Parliament it is pro-

21 *Hen. 8.*
cap. 5.

13 *Ed. 3.*
c. 4.

provided, that the King's Justices should, as well at the King's Suit as at the partie's griev'd, enquire after such Oppressions or Extortions, for so they be called; yea, *St. Germ.* who was no stranger to the Civil and Canon Law, as appears by his Book, saith, that the Ordinary ought to take nothing for the Probate, if the Goods suffice not for Funeral and Debts; but he means onely that Conscience is against it.

Do. & Sin?
l. 2. cap. 10.

Now we come to the third occasion of Disbursement, *viz.* payment of Debts, which is the main part of our business. We have before seen what Debts lie upon Executors, having *Assets* to pay them; we are now to see in what order they must pay them, as well *ut sint fidi dispensatores*, as for their own indemnity, *ne quid res sua capiat detrimenti*. To put our selves into the better order or Method of handling these things, we will sort our Debts into their several kinds, thus.

They are of these three sorts, *viz.* either
Debts of or upon Record;
Or, Debts by Specialty;
Or, Debts without Specialty.

The Debts upon Record may be again divided into four sorts or kinds, *viz.*

Debts to the King or the Crown.

Debts

Debts by Judgment or Recovery in some Court of Record.

Debts by Recognizance.

Debts by Statute-Staple, or Statute-Merchant.

Amongst these, the Debts of the Crown are to have the first place of precedence; so as if there be not come to the Executor Goods of greater value then will suffice for the satisfaction of these, he is not to pay any Debt to a Subject; and if he be sued for any such, he may plead in Bar of this Suit that his Testator died thus much indebted to the King, shewing how, &c. and that he hath not Goods surmounting the value of that Debt. Or, if the Subject's pursuit be not so by way of Action, as that the Executor hath day in Court to plead, but be by way of suing Execution, as upon Statute-Merchant or Staple; then is the Executor put to his *Audita querela*, wherein he must set forth this matter. And there is great reason why the King's Debts should thus be preferred before any Subject's, viz. for that the Treasure Royal is not onely for sustentation and maintaining of the King's Household, but also for Publick services, as the Wars, &c. as appears by the Statute

*M. 33 & 34
Eliz. the
Lady Wal-
singham's
Case in com.
ban. & Tr.
39 Eliz.*

tute 10 *Rich. 2. cap. 1.* And therefore it is, as I conceive, that *Bracton* saith of the *Lib. 1.* Treasures or Revenues Royal, *Roborant Coronam*, they do strengthen or uphold the Crown. And for the like Reason, as I think, did God inact touching the possessions of the Crown, that if they were given to any other then the King's own Children, they should revert and come back to the Crown the next Jubilee, which was once in fifty years. *Sed de hoc satis.* But this priority of payment of the King's Debt before the Debt of any Subject, is to be understood onely of Debts by or upon Record due to the King, and not of other Debts. If any ask how the King should have any Debts which shall not be of Record, since by the Statute 33 of King *Hen. 8. chap. 30.* it is inacted, that all Obligations and Specialties taken to the use of the King shall be of the same nature as a Statute-Staple: To this I answer, that there may be sums of money due to the King upon Wood-sales, or sales of Tin, or other his Minerals, for which no Specialty is given; so also for Amercements in his Courts-Baron or Courts of his Honours, which be not Courts of Record; the like of Fines

21 E. 4. 21.
22. So must
it be plead-
ed M. 33 &
34 Eliz.

Fines for Copy-hold states there; so of the money for which Strays within the King's Manors or Liberties are sold. Also, as the Law hath lately been taken and ruled in the Exchequer, even Debts by Contract due to any Subject are by his Outlawry, or Attainder, forfeitable to the Crown. Yet neither these, nor those due to such person out-lawed or attainted by Bond, Bill, or for Arrerage of Rent upon Lease, are or can be any Debt of Record, untill Office thereupon found; for although the Outlawry or Attainder be upon Record, yet doth it not appear by any Record, before Office found, that any such Debt was due to the person outlawed or attainted. Thus are not these Debts to the Crown to have priority of payment before the Subject's Debts, though the King's Debts of Record are so to have. So that if a Subject to whom the Testator was indebted by Specialty sue for this Debt, the Executor must plead, that the Testator died indebted thus much to the King by Record, more then which he left not Goods to satisfy; if the truth of the Case be so: for if there be sufficient to satisfy both, then the Subject Creditor is not to stay for his Debt till the King's Debt

And must plead the Record in certain, as was held in the Case of the Lady *Walsingham*, *M. 33 & 34 Eliz.* But it sufficeth to say, by a Record of the Exchequer, as was held *Tr. 39 Eliz. in ban. Reg.*

Debt be levied. And if the Subject Creditor sue Execution upon a Statute, so that the Exec. hath no day in Court to plead this Debt to the King, then is the Exec. put to an *Audita querela*, wherein he must set forth that matter, and so provide for his own indemnity. But what shall we say of Arrerages of Rent due to the King? Surely, where it is a Fee-farm Rent, or other Rent of Inheritance, I see not how it can come under the title of Debt; since for it no Action of Debt is maintainable so long as the State continueth in him to whom it grew due; and I find that the *L. Dyer, M. 14 Eliz.* said, that the King could but onely distrain for his Rents, and not otherwise levy them of Lands or Goods; and that the King by his Prerogative may distrain in any other Lands of his Tenant, our Books tell us, but no more. Yet I know it hath been otherwise done of late in the *Exchequer*, which if it have been the ancient and frequent use of the *Exchequer* it will stand as Law, though unknown to the *L. Dyer*. Now Rent upon a Lease for years differeth from the other, since for the Arrer. thereof an Action of Debt lieth. But how can either of these be Debts of Rec. when the not payment may

be either in the Court of *Exchequer*, or to the Receiver general or particular? and how then can there be any certain Record of the not payment, so as to make any certain Debt upon Record? We know Statutes have been made to make the Lands of Receivers subject to sale for satisfaction to the Crown; and besides that, some ancient Patents direct the payment of Fee-farms into the hands of Sheriffs. The Stat. of *Westm.* 1. cap. 19. provides remedy for the King against Sheriffs not answering the Debts of the Crown by them received: so as the King's Farmer or Debtor may have paid his Rent, or other Debt, and the Crown have not yet received it. Of Fines and Amerciaments in the King's Courts of Record, there is no doubt but they are Debts of Record.

Come we now to the Debts of Subjects, and first those of Record. Touching which I shall not be able to hold so good a Method, and so well to handle things by parts, as I would; for that the parts so stand in competition one with another for precedence, as that they must of necessity thereabout conflict and interplead one with the other, and contest one against the other: yet for the Reader's better ease, and
ability

ability to find out that which may concern him in his particular case, I will, in the best sort I can, single out these things into several parts, and place them in several rooms or stations. First considering how it shall stand between one Judgment and another, had either against the Executor or Testator. Secondly, how between Judgments and Statutes or Recognizances. Thirdly, how between Recognizances and Statutes. Fourthly, how between one Recognizance and another. Fifthly, how between one Statute and another. Adding to each some Observations incident.

Now, next to the Debts of the Crown, are Judgments or Debts recovered against the Testator to have priority or precedency in payment, as being of an higher nature or more dignity then any other : for that Statutes and Recognizances, though they make Debts upon Record, yet are they begotten but by voluntary consent of parties ; whereas in every Judgment there hath been a course and work of Justice against the will of the Defend. as is presumed, and this in a Court of Justice, and the Records of such Judgments are entred in publick Rolls, not kept or

Co. l. 5. f.
281. So *Wray*
and *Gaudy*,
inter *Bond*
and *Bales*,
28 *El. vel*
circiter.

Yea though
a Writ of
Error by the
Exec. to re-
verse the
Judgment,
yet suffering
a Stat. to be
executed,
must pay of
his own.
Read and
Beachblock's
Case, P. 43
Eliz. Barre.
So held in
Reaa's Case
sup. a. Vide
12 H.7. Kel.
24, 25. to
like pur-
pose.

Co. lib. 4. f.
59. So *Peti-*
am in com.
ba. inter
Charnock &
Winsley,
24 *Eliz. vel*
circiter.

carried in Pockets or Boxes, as Statutes, as
untill Inrollment Recognizances are.
Therefore Executors must take heed that
Judgments against their Testators, (before
Debts any other way) if they have not suf-
ficient for both, be first satisfied, lest they
draw the burthen of this Debt upon their
own backs. Now their way to help them-
selves, being sued or pursued for other
Debts, is the same before delivered touch-
ing Debts upon Record to the Crown, viz.
by Plea, where they may plead, as in *Scire*
facias upon a Recognizance, or Suit upon
Band; and by *Audita querela*, where they
cannot plead, as when Execution is sued
upon a Statute. And if they had no warn-
ing in the *Scire facias*, but upon *Nilil*.
returned the Judgment passed, there also
the Exec. may be relieved by *Audita que-*
rela; because there was no default in him
that he did not plead, or set forth the
Judgment upon the Suit in the *Scire facias*.
Nor will it be any Plea for the Creditor by
Stat. to say, that his Statute was acknow-
ledged before the Judgment, and so is
more ancient; for a latter or more puiſne
Judgment is to be preferred before a
Statute in time precedent. But if this
Judgment be satisfied, and it onely kept
on

on foot to wrong other Creditors, or if there be any Defeasance of the Judgment yet in force; then the Judgment will not avail to keep off other Creditors from their Debts. And thus much touching Debts by Judgment, *viz.* how they stand in priority before other Debts by Statute or Recognizance. Now to see how they stand among themselves, let this be observed, *viz.* that between one Judgment and another had against the Testator precedency or priority of time is not material; but he which first sueth Execution must be preferred, and before any Execution sued it is at the election of the Exec. to pay whom he will first: yea, if each bring a *Scire facias* upon his Judgment, the Exec. may yet confess the Action of which he will first, notwithstanding the *Scire facias* was brought by the one before the other. In this *Scire facias* the Defendant may plead generally, that he hath fully Administred before the *Scire facias* brought, without shewing that he did administer in payment of Debts of as high nature; yet that must be proved upon the Evidence, else the Trial will fall out against the Exec. Thus have I delivered the most material things, in my apprehension,

Co.l.5. f.28.
Co.l.8. f.132.
So held in
15 & 16 El.
So in the
Scire Faci as
by Bond 2-
gainst Bales
it was held

hension, touching Debts by Judgment: yet thereabout I will add, for the better information of the Reader not studied in the Law, these few things. First, that what hath been said is onely to be understood of Judgments against the Testator, and not of any against the Executor himself; for of those, being but Debts of Specialty at the time of the Testator's death, we shall speak after. Secondly, what is said of the Testator, in case of an Executor immediate, is likewise to be understood of the Testator's Testator, in case of the Executor of an Executor: for where *A* makes *B* Exec. and *B* makes *C* Exec. there the Goods which came from or were left by *A*, be not in the hands of *C* liable to Judgments had against *B*; nor, on the other side, are the goods of *B* in the hands of *C* subject to the Judgments had against *A*. And the like is to be understood of Statutes, Recognizances and Bonds, as elsewhere is somewhat touched. Thirdly, Recoveries or Judgments by meer confession, without defence, are yet of the same nature, and to have the same respect, as other Recoveries upon Trial or otherwise: for although they may seem to be but of the nature of Recognizances, which be debita

9B.4.14,15.
Quere, of
 Arrerages of
 Account be-
 fore Audi-
 tors with-
 out Suit;
 for the Exe-
 cutors are
 charged by
 Judgment of
 the Auditors
 by Stat. 2.
 Judgment of
 Record.
 10 H.6.24;
 25. Bre, det,
 183.

recog-

recognita ; yet do they differ from them, in that here a Debt is demanded by a Declaration which is intended true, and that therefore the Defendant cannot deny it ; but in case of a Recognizance it is not so, for there usually no Action is entred, nor Debt demanded. Fourthly, the foreshe-wed respect to Debts by Judgment is not to be inclosed within *Westminster Hall*, and be restrained to the four Courts there, but may and must extend it self to Judgments in other Courts of Record, *viz.* in Cities and Towns Corporate, having power by Charter or Prescription to hold Plea of Debt above forty shillings, as in *London, Oxford, &c.* For although there Execution cannot be had of any other Goods then such as be within the Jurisdiction of that Court ; yet if the Record be removed into the *Chancery* by *Certiorari*, and thence by *Mittimus* into one of the *Benches*, so Execution may be had upon any Goods in any County of *England*. Fifthly, in Case where the Testator was bound in a Recognizance, and a *Scire facias* brought against him, and thereupon Judgment given ; although this Judgment be not, *quod recuperet*, as in case of Actions of Debt, but, *quod habeat executionem* after.

Quere of Judgment in a Writ of Annuity for Arrerages after.

nem; yet since Execution is the life, fruit and effect of all Judgments, this may now well stand for a Debt by Judgment, as I take it.

Of Recognizances and Statutes.

NExt unto Debts by Judgment are those by Stat. or Recognizance to be regarded by the Executor. And because I find no difference of priority or prece-
dency between these two, I therefore rank them together: Yet one reason of preferment given to Judgments before Statutes in *Harrison's Case*, viz. that the one remains a Record upon a Roll in the King's Court, whereas the other being carried in the pocket of the Conusee is more private; this, I say, should give priority also to Recognizances before Statutes: As also another reason, for that Statutes are not properly Records, but Obligations recorded; yet do I not find that this makes a difference for priority of payment, And indeed the Stat. is the more expedite remedy, since thereupon Execution may be taken out without a *Scire facias* or other Suit, which cannot be in the case of a Recognizance: for there, if a year be past after the Acknowledgment, no Execution can be sued out against the party

party himself acknowledging it, without a *Scire fac.* first sued out against him; and if he be dead, then though the year be not past, yet must a *Scire facias* be sued, and thereupon the Executor Defendant may plead some Plea to hold off the Execution for a time. But, this notwithstanding, the Executor may satisfy the Recognizance before the Statute, at least if he do it before Execution sued thereupon; for they standing in equal degree, it is at his election to give precedency and preferment to whether he will. Neither is it material which of them were first or more ancient; nor between one Statute and another doth the time or antiquity give any advantage as touching the Goods, though as touching the Lands of the Conusor it doth; but as for his Goods in the hands of his Executor, whosoever first getteth hold of them by his Execution, shall have the preferment. And before suing of Execution, the Executor may give precedence or preferment to whom he will. But now some may object, that there is no course nor Writ of Execution for any such Conusor against the Executor; and if so, then Statutes-merchant and of the Staple are in vain spoken of, and it is true that Master

Before *Sci. fac.* not after voluntarily, but if levied by Writ of *Extend.* is good.

Brook,

Bro. No. c.
294. & Stat.
Mer. 43.

Co. l. 3. f. 28.
b. H. 30
El. rot. 119.

R. 32 El. rot.
735. in co. b.

Brook, after Chief Justice of the *Common Pleas*, in his New Case, professeth, that he knew not any remedy for the Creditor out of the Goods of the Conusor after his death. But if this should be so, the Law were very defective, since the substance of many, especially of Merchants, for and among whom the Statute-Merchant was provided, consisteth usually more in Goods then Lands: besides, the Plea of *Harrison*, Administrator of the Goods of *Sidney*, in Bar of *Green's* Action of Debt upon an Obligation, viz. that the Intestate stood bound in a Statute-staple to *J S*, and *Green's* Reply thereunto, that there were Indentures of Defeasance, no Covenant whereof was broken, and the Resolution of the Judges, that the said matter in the Replication was good to avoid the Defendant's Plea; all this, I say, (and the Resolution of the Judges of the *Common Pleas* in that Case, and in the Case between *Pemberton* and *Barram*, as also in the *King's Bench* by *Popham* and the rest of the Judges, that Executors must satisfy Judgments before Statutes, and Statutes before Obligations) had been idle, and favouring of grosse ignorance, if no Execution at all

all could be had against the Executor of him bound in a Statute; and then should *Green* have demurred upon the Plea of *Harrison*, and needed not to have pleaded that other matter: but none of the Judges or Serjeants ever conceited any such matter. That which there was replied, *viz.* that the Statute was not forfeited, is here to be remembred as good matter both against Statutes and Recognizances; and that whether the Recognizance have a De-feasance, or a Condition not broken, so that the Recognizance is not forfeited. In none of these Cases is the Executor hindered from payment of Debts by Specialty, nor can he be justified or excused if by colour thereof he refuse so to doe: and indeed else might Creditors be exceedingly defrauded by Recognizances for the peace and of good behaviour, &c. and so by Statutes for performing Covenants touching the enjoying of Lands, if these should keep off the payment of Debts; and yet themselves perhaps never be forfeited, nor the sums become payable.

See *Co. lib. 5.*
91. Executi-
on against an
Exec. upon
a Statute.
Semaine's
Case.

Co. lib. 5. f.
28. So if sa-
tisfied,
though not
discharged.

Of Debts by Specialty.

NOW come we to Debts due by Specialty, *viz.* Bond or Bill, (of which nature the greatest number of Debts are.) Let us then see what course the Executor must or may hold for satisfaction of these, admitting that the Testator stood not indebted by any Record, or that no forfeiture is of any such Debt, or that there be Goods in the Executor's hands above the Amount of such Debts by Record. This, I say, *dato*, then, according to the Rule, *Proximus quisque sibi*, the Executor may first satisfie himself of such Debts as the Testator by Specialty owed him: for such Debts are not released by the Creditor's taking upon him to be Executor to the Debtor; though, on the other side, if the Creditor make his Debtor Executor, this is a Release of the Debt. Although it be given out or commonly spoken in the general, that an Executor may first pay himself; yet is it to be understood with this caution or condition, *viz.* That the Debt to him be of equal height or dignity with the Debts to others, according to the Rule, *In equali jure, melior est condi-*

tio

in possidentis: for if his Testator were indebted to other men by any Statute, Judgment or Recognizance, and to him whom he maketh Executor onely by Bond or other Specialty; then may he not first pay himself, that is, by paying of himself leave them unpaid whose Debts are of an higher nature; but if there be sufficient for satisfaction both to them and himself, then is it not material which he first paid. Now touching the Debts to other men, the Executor hath power to give preferment in payment to whom he will: so that if the Testator left but 100 l. being indebted to *A* 100 l. and to *B* 100 l. by several Obligations; the Executor hath power to pay *B* his whole Debt, and to leave *A* altogether unpaid any part of his Debt, so as he have not commenced any Suit before payment to *B*. But yet herein this difference is to be taken and observed by Executors, That if the time of payment upon the Bond of *B* were not come at the time of the Testator's death, then may not the Executors, before the money to *B* become payable, pay him, and leave *A* unpaid, whose money was presently due. Yet if *A* forbear to demand or sue for his Debt till the Debt of *B* become also payable; then

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28 H.8. Dy.
82. Doct. &
St. ca. 10. p.
78.

Do. & St.

p. 78.

Quere, if
then he may
not plead
this Judge-
ment post
ult. contin.
against *A*,
as he may
plead it a-
gainst other
Suits after
commenced.
Co. lib. Intr.
148, 269,
149. a.

is it at the will of the Executor to pay whether of them he will; so as the other may lose his whole Debt, if the Goods will not suffice to pay both. What if *A* have onely by word demanded his Debt, and not by Suit, before the Debt to *B* become payable? whether doth that hinder that the Executor may not now, when the money to *B* is also payable, pay him, and leave *A* unpaid? And hereunto *S.* *Germ.* answereth negatively, making this verbal demand to be idle and of no value: yet he addeth, that if *A* have commenced Suit before the Debt to *B* become payable, yet if the Executor can delay the Suit till the Debt of *B* become payable, so that *A* can get no Judgment before that time, and before *B* hath commenced Suit upon his Bond, then may the Executor confesse his Action, and so pay his Debt, leaving *A* unpaid. But of this I make some doubt, for that I find in 9. of King *Edw.* 4. some Admittance, that if *A* having a Tally, Patent, or other Warrant from the King, for receipt of money of or from a Customer or Receiver, where other had like Warrants before him, but *A* maketh the first Demand; now must the Officer first pay him,

him, or else himself shall become Debtor to him, if he first pay others whose Demands were after made, though they had Warrants before *A*. Likewise there is, as to me seems, some Admittance in the same Book, that the very Demand made by a Creditor of his Debt from an Executor, who hath then *Assets* in his hands, doth intitle the Creditor to recover dammages against the Executor out of his own goods: which if it so be, then doth even the verbal Demand lay some tie or obligation upon the Executor for payment. But hereabout I lay down nothing peremptorily. We partly may discern by the Premisses how the Executor is to guide himself, in the case where there be divers Debts by Specialty all due and payable at the Testator's death, before any Suit commenced for any of them: for in that case clearly the first verbal Demand gives not any precedence, all being due, and so standing in equal degree. And this is implied in many Books, making the commencement of the Suit onely that which intitles to priority of payment, or at least restrains the election of the Executor. Yet, admit that one Creditor first doth begin Suit, if others

41 E. 3. Fitz.
Ex. 69. 6 & 7
El. Dy. 232.
Vide 21 H. 7.
Kelw. 74.

5 Hen. 7. 27.
 86 Walmsley
 Just. P. 39
 Eliz. in
 Error a. Ser-
 jeants Inne.
 Co. li. Inr.
 286. such a
 Recovery by
 Confession
 is pleaded
 against a-
 nother, and
 admitted
 good, & f.
 148, 149.
 Do. & St. p.
 78. b.

others also after sue before he be paid,
 or have Judgment; now cannot the Exe-
 cutor pay him first who first commenced
 Suit, but he who first hath Judgment
 must first be satisfied. And the Execu-
 tor may herein yield help to one before
 the other, viz. by Essoigns, Emparlan-
 ces or dilatory Pleas to the one, and by
 quick Confession to the other's Action:
 for he is not bound against his will to
 stand out in Suit, and expend Costs, where
 the Debt is clear; nor is this Covin, but
 lawfull Discretion, which Conscience will
 also approve, some good consideration
 inducing. Nay, after Suit commenced,
 yet untill the Executor have notice there-
 of, he may pay any other Creditor, and
 then plead that he hath fully administred
 before notice. Nor is the Sheriff's re-
 turn of Summons or Distress sufficient
 cause of notice; for the Summons might
 perhaps be upon his Land: but if it were
 to his Person, it is notice sufficient; and
 then, to save himself, he must say, that
 he was not summoned till such a day, be-
 fore which he had fully administred. Yet
 doubtless the Executor may be arrested
 at the Creditor's Suit in some sort, which
 yet shall be no sufficient notice of this
 Debt,

Debt. As for the purpose, if he be sued by *Latitat* out of the *King's Bench*, this, supposing a Trespass, gives no notice of a Debt, so also of a *Sub-pœna* out of the *Exchequer*; but the Original returnable in the *Common Pleas* expresseth the Debt, and so in some sort doth the Process thereupon. And there it seems by some Books, that if it be laid in the same County where the Executor dwells, he must take notice of it at his own peril. But this I take not to be Law, nor is there any great opinion that way: and although, to make it more clear, the Executor in *King Hen.* the fourth his time, estranging himself from notice of the Suit before payment to others, did alledge, that the Action was laid in a forein County; that is no great proof, that if his abode had been in the County where the Action was brought he must have taken notice; but thus it was clearer, and a little surplussage hurts not.

Now between a Debt by Obligation and a Debt for Rent or Damages upon a Covenant broken, I conceive no difference, nor any priority or precedency; but it is at the Executor's discretion to pay first which he will, as if all were by Bond. So also

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of

So also was
it said Tr.
29 Eliz.

of Rents behind and unpaid, as I conceive; but touching them, principally intending Rents upon Leases for years, divers considerations are to be had, and some Distinctions to be made. As first, between Rent behind at the time of the Testator's death, of which that before said is to be understood, and that which groweth behind after, next between Suit for the Rent by Action of Debt, and Distress and A-vowry. As to the first difference, if the Rent grew due since the Testator's death, then is it not accounted in Law the Testator's Debt; for onely so much is in Law accounted *Assets* to the Executor, as the profits of the Lease amounted to over and above the Rent; so as for that Rent so behind the Executor himself stands Debtor, as hath been resolved, and therefore he is suable in the *Debet* and *Detinet*: whereas for Rent behind in the Testator's life, and all other the Debts of the Testator, he must be sued in the *Detinet* onely. Hence it must follow, as it seems, that an Executor sued for Debt upon Bond or Bill cannot (except in some special Cases) plead a payment or recovery of Rent grown due since his Testator's death; though of Rent behind at the time of his death it be otherwise. And yet

yet here again another difference or distinction is to be taken, *viz.* where the Profits of the Lease exceed the Rent, and where the Rent is greater then the yearly value of the Profits; for even there, as elsewhere is shewed, the Executor, if he have *Assets*, is tied to the holding of the Lease, and payment of the Rent, and consequently, doth so much of that Rent as exceeds the yearly Profit stand in equal degree the Testator's Debt, with other Debts by Specialty. And yet again to re-consider this Point, what if the Debts of the Testator by Specialty payable presently at his death, or before the time that any Rent can grow due upon this Lease, shall amount to the full value of the Testator's Goods; may not then the Executor, though he do not pay those Debts before the Rent-day, (for that would make the Case clear) wave the Term? for if he may, then haply if he do not so, but shall by payment of any of this Rent want Goods to pay any part of the Debts by Specialty, it may lie upon himself and his own Goods, as happening by his own default. But on the other side it may be said, that he could not wave it so long as he had *Assets*, because thereby he stood equally liable to pay that Debt, be-

The Office of

ing once due, as the other Debts by Specialty. On the other side it may be said, that though the Debts for Rent and upon Bond shall be admitted to be in nature equal; yet the Case being put of Rent not due at the time of the Testator's death, it was not then a Debt nor Duty, whereas a Bond makes a present Debt and Duty, though not presently payable, the day of payment being not yet come; so as this latter is discharged by a Release of Debts or Duties, and so is not the former. So to leave that Point unresolved, let us next see whether in some case, though the Rent exceed not the yearly value of the Land, yet even that payable after the death of the Testator may not stand in most part, if not wholly, upon the Testator's score, as his Debt, as well as if it had been payable before his death. *Posito* then that the whole or half year's Rent is payable at the *Annunciation* of our Lady, and that the Testator dieth two or three days or some like short time before that Feast; now certainly should the Law be unreasonable, if it should lay this Debt upon the Executor's shoulders, in respect of those few Winter-days profits which he took. But surely, since the taking of the Profits induceth
the

the Law to lay the Rent upon the Executor as his own Debt; therefore, as where the Executor had the Profits for the whole year or half year, except some few days incurred in the Testator's life-time, those few days will be unregarded, according to the Rule, *De minimis non curat Lex*, and the whole Rent shall lie upon the Executor as his own Debt; so on the contrary part, when the whole year or half year's Profit, except some few days, incurred after the Testator's death, the Rent, becoming payable so instantly after the Testator's death, must in reason lie wholly upon the Testator's Estate, as to me it seems. What if to this I add, that the Testator's Cartel wherewith the ground was stocked do depasture and devour the Profits all the time after the Testator's death, till the day of payment of the Rents? Nay, if the Rent were payable at *Mich.* and the *Annunc.* and the Testator dies a few days after *Mich.* the Rent being of or near the value of the Land, it will then be hard that the Exec. shall for this Winter-profit pay the Rent out of his own purse, especially if the whole year's Rent be payable at that one day, as in some Cases it is; or if the whole year's Profits were taken in

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the Summer, as in case of a Lease of Tithes, It is so also of Meadow-grounds, usually drowned in the Winter. So if the Lease be then to end, not having a Summer half-year to succeed and make amends for the Winter: or if the Winter half-year be the latter half, the Lease beginning at *Lady-day*, so that there is but a Summer for each Winter following, and not any for the Winter passed. Of like consideration with these is the case of a Lease of Woods for a Rent, which being fellable but once in eight or nine years, now if, the Lessee having made the last Sale and Felling before his death, the Law should cast the Rent upon the Executor's own Estate for the time future, it should lay loss upon him; which is against Reason, and contrary to the nature and disposition in the Law, even in this particular; as appears by this, that she enables an Executor to pay himself before any Debt of equal nature, so as she more tenders an Executor's indemnity than any other Creditor's. Therefore I think that, with and upon the differences above shewed, even Rent grown due after the Testator's death may in some cases be the Testator's Debt, payable equally with Debts by Bond.

Bond. But here I conceive, that if the Executor were in such case of destitution of *Assets* as might justify his waving of a Lease over-rented, he then may wave the term's residue; because for the future the Profits will come short of answering the Rent, though at the first, and so in the total, the Profits did exceed the Rent. And if for want of waving where he might this Rent fall upon him, the payment thereof would be no excuse against another Creditor, nor as to him be a good Administration; for *Ignorantia Juris non excusat*. This is pertinent to our present consideration, which Debt may with safety be paid, leaving another unpaid: and the hazard of Executors by ignorance of the Law hath been a principal motive to my writing these Discourses in *English*. Hitherto we have onely considered, as I think, of Rents as they be recoverable by Action of Debt. Now let us see if there may not be somewhat different considerations touching distraining for Rent, and so coming to recover it by Avowry. Put we then the case that an Executor hath fully administr'd in payment of Debts by Bond, and after the Lessor or Reversioner cometh and distraineth for Arrerages of

Rent due in the Testator's life; can the Executor in bar of the Avowry plead Fully administred, as he might have done if an Action of Debt had been brought for these Arrerages? Doubtless, I think no; nothing shall hinder the levying of the Rent upon the Land, so long as it is enjoyed under the title of the Lease, except the Land come to the King, upon whose possession no Distress can be taken. I think therefore that the Executor, who pay'd out of his own purse to the value of this Lease, (for so I intend the Case, and else could he not have fully administred, as in the Case was put) should have abated in the price and valuation of the Lease as well the Arrerages of Rent, as the Rent futurely payable, both being equally leviable upon the Land; and if he so have done, he is no loser by payment of this Arrerage: but if, trusting to the power of an Executor and to the Plea of Fully administred, he did not so, but disbursed, in respect of the Lease, to the full value without such Abatement, he must bear the loss of his own ignorance. He might also another way have helped himself, *viz.* by payment of that Arrerage, leaving other Debts by Specialty unpay'd. And what if Suits were pre-

presently commenced upon the Testator's death, before he could make payment of the Rent behind? whether might the Executor then plead this Debt for Rent, as he might a Debt by Judgment or Statute? Surely methinks it's probable that he might, because it is a Debt from which he cannot be freed by payment of the other Debts sued for by Specialty. If the Reversioner would also commence Suit before Judgment had for the Creditor by Specialty, then might the Executor help himself by confessing his Action first: but this perhaps the Reversioner would not conceive safe for him, since that way the others might get Judgment before him, and so he might lose both his Suit and his Debt; whereas holding himself to the course of Distress, the Lease continuing, he hath Land at the stake for his Debt. What if he distrain and avow? may not now the Executor pay him, or at least confess his Action or Avowry, so as he first having Judgment may first be satisfied? Surely after Suit commenced I see not how the Creditors by Bond can so be prevented, at least without Judgment had for the Rent, yea though such a Judgment be had: yet because the Judgment in that case is not, that he shall recover
the

See 13 R. 2.
Bro. Pledge
31. Attain-
der of the
party di-
strain'd that
not take a-
way the Di-
stress, vi. Dy.

the summe due for Rent, but onely that he shall have a return to the Pound of the Cattel distrained for the Rent, it is questionable whether the payment there-upon of the Rent shall prevent the Judgments after had in the Suits upon Bonds. But I think it shall; because although it be not an expresse Recovery of the Rent, yet it is such a Judgment compulsory for the same as makes the payment inevitable and of necessity. And where before we have made the question onely between the said Rent-debt and the Debt by Obligation; let us now put the Case between the Rent-debt and the Debt by Statute or Judgment. If then the Lessor, after death of the Lessee, distrain for the Rent behind part of the Testator's Cattel, and after there come a Writ of Execution upon a Judgment or Statute of the Testator's; whether shall these Beasts in the Pound for Rent be delivered in Execution or not, admitting that without them there be not Goods sufficient for satisfaction of the Judgment or Statute? And surely I think they cannot be delivered in Execution. First, for that they are in the custody of the Law, as in *Stringfellow's Case*, though there the King's Prerogative

ative overtopped that point. Yea so think, though they be replevied, for they are to be returned to the land, if Judgment pass for the Avowment, to which purpose Security is given; as they are but in the case of a Prisoner bailed, who still is in some sort in custody. Secondly, for that this Rent is incident to and descendable with the Reversion breeds a Debt of a real nature, and so of more dignity and worth than debts personal. Thirdly, for that the Tenant (as in a sort Debtor) stands chargeable with this Distress from the very time of making the Lease, as either by Contract real of *quid pro quo*, or rather by an operation of Law or Legal Institution, or ancient Custome of the Realm, without any Contract of persons. Lastly, for that the Lessor doth distrain the Cattell therefore, or in that respect, for that they are or were Goods of the Testator, but for that he found them levant and couchant upon the Land which must afford his Rent, and a Distress for it if behind: so as if there had been any Under-tenant's or stranger's Cattell, they might have been distrained. Some may perhaps object
this

this reason why these impounded Cattel should be delivered in Execution, *viz.* that where otherwise the Creditor by Sentence or Judgment should lose all or part of his Debt, yet by this Relief done to him shall not the Lessor lose his Rent, for that he may at any time after distrain his Goods or Cattel found upon the ground at any time during the continuance of the Lease. But here, besides the point of delay and stay for this Rent, which is many is the sole means of maintaining their Households and Families, this stay is rather considerable, that perhaps the Lease may be near expiring, perhaps so highly racked and rented even to or above the value, as that the Executor having his Testator's stock taken from it and sold by Execution, will not stock it any more and so the Land lying fresh, if the Lessor shall lose the benefit of his former Distress he shall be perhaps without remedy for his Arrearages of Rent. And if the case were of a Distress for Rent behind after the Testator's death, I conceive, though not so strongly, for most of the reasons above said, that the Law would be all one as in the other Case: for though in this Case respect shall not be had to the Executor

is upon whose Goods the Law casts this Debt, though not the other; yet here the point of loss must fall either upon the Lessor losing his Distress, or upon the other Creditor by Specialty or Record losing wholly or in part his Debt. And in respect of this local tie upon this Land for payment of the Rent, whereto even the Fealty of the Lessee and Tenure of the Land bindeth him, I think no act that the Lessee can doe by entring into Bonds or Statutes, or having Judgment against him, can hinder the Lessor or Reversioner from taking his remedy upon this leased Land for the Rent therefore due; but rather by other Creditor shall be a loser in his Debt. Doubtless, if in bar to the Avowry for this Rent due either before or since the Testator's death the Executor will plead, that the Testator was indebted 1000 l. by Statute, Recognizance, or Judgment, which is more then all his Goods amounted unto; it will be no good plea, but may be demurred upon. What he plead so much Debt of Record to the Crown? Surely I doubt whether this plea will be allowed in any other Court then in the *Exchequer*: yet if these Arerages of Rent shall be levied upon the

*Vide Bro.
Pledg. 31.*

the Land; so as either the Executor must pay it, or lose the Cattel distrained by a Return irreplevisable, and the Debtor shall not have sufficient to satisfy his Debt to the Crown; I see not how he shall well escape, when pursued in the *Exchequer* to make up this Crown-debt out of his own purse, which is hard. For this we may pitch upon as a Maxim and Principle, that an Executor, when no default is in him, shall not be bound to pay more for his Testator then his Goods amount unto. Again, it is a rule that where nothing is to be had, *viz.* justly to be had, the King loseth his right, and our Books tell us, the King's Prerogative must not doe wrong. *Potestas est, non injuria: nam potestas injuria non est Dei, sed Diaboli.* On the other side, it may be said, that if Land leased come to the King by Grant, Outlawry, or otherwise, the Rent reserved cannot be distrained for; and therefore it is not very unreasonable nor incongruent that the King's interest for his Debt should make the Distress of a Subject stand by and give place. This therefore among other of the Premisses do I leave as a *Quære*: nor is it altogether unprofitable

So Braddon.

fitable either for an Executor or Creditor to know what ways and passages, what cases and contingents be doubtfull and hazardous. And if in these unbeaten paths, where our Books and Relations have held me forth no light express or particular, I have erred in mis-resolving, or missing to resolve; I hope I shall without difficulty obtain pardon.

Now let us consider of Assumptions or Promises made by the Testator upon good consideration; the performance whereof, or making recompence and satisfaction for not performing, doth lie upon an Executor, as before is shewed. These therefore are to come behind, and give place unto all the former; so as an Executor this way or for these sued may plead Debts by Specialty, Rent, &c. amounting to the whole Goods. And yet these Debts by Contract or Assumption express are to be satisfied before Legacies be to be had. First, because by the Common Law of the Land those are recoverable, and so are not Legacies. Next, because, as our Books speak, it concerns the Soul of the Testator to have *as alienum*, all Duties and Debts to other men, satisfied before the Debtor's voluntary Gifts or Bequests.

Co. lib. 9. fo.
88. b. Doct.
& Stu. lib.
2. cap. 10 &
11.

quests. Also these Debts by Assumption or simple Contract are to be satisfied before the reasonable part of the Wife or Children, to which by Custome in some Counties they are intitled. See 21 *Ed.4.* 21. and 2 *Ed.4.* 13. and 2 *Hen.6.* 16. And note that in such an Action upon the Case, it is not of necessity to lay or set forth in the Declaration that the Defendant hath *Assets* to pay all Debts by Specialty, and this also : but if there want, the Defendant must alledge that in his excuse, for else it shall be presumed that he hath *Assets*. So also in an Action upon a Case grounded upon the Executor's own Assumption to pay his Testator's Debt : and yet, as the *L. Coke* conceives, and upon good reason, as to me it seems, if the Executor so promising had not *Assets* sufficient in his hands to pay this Debt promised, he pleading *Non assumpsit*, may give that in evidence ; for then the consideration faileth ; as also if there were no such Debt due, since the Plaintiff could not have recovered if he had sued, and so his forbearance to sue was no valuable consideration.

Co.l.9. fo.
90. b. Finchon's Case ;
and fo. 94.
Dane's Case.

CHAP. XIII.

Of Devastation or Wasting.

THat which St. *Paul* of Dispensers Spiritual (who are as it were the Executors of the last Will and Testament of our Saviour *Christ*) doth say or enjoin, *viz.* that they must *be found faithfull*; the same is required of these lesse or inferiour Dispensers, the Executors of mens Wills: and hereof they are to be regardfull, not onely in respect of escaping dammage to their own Estates, but more especially in respect of an Oath which divers of our Books mention to be taken by Executors. And in one of the Books of relations of Cases in the twentieth year of *H. 7.* his time, there is an expression of three things whereto the office of an Executor tieth him. 1. To doe truly, and thereto are they sworn, saith this Book. 2. To be diligent, *viz.* with sedulity to attend the discharge of the trust. 3. To doe lawfully; nor well can this latter be without knowledge what is lawfull

or required by the Law. Now what is formerly said of the right Method and order of payment of Debts, discovereth in much part how and by what ways an Executor may waste and mis-spend his Testator's Goods, and consequently incur a Devastation, and so make his own Goods liable. But of that more fully and particularly by it self. And herein we will consider of these parts.

1. What shall be said to be a Wasting or Devasting, and how many ways that may be done.

2. Who shall by this Act be charged to yield recompence.

3. Who shall take the Benefit or advantage of it.

4. How far or in what measure the Advantage shall be taken.

5. What way or by what means it shall be had.

As to the first: this Wasting is done divers ways. 1. By the Executor his plain, palpable and direct giving, selling, spending or consuming the Testator's Goods after his own will, leaving Debts unpay'd. 2. By paying what is not to be pay'd; which yet is to be understood where there are Debts payable, and unpay'd.

pay'd. 3. By the way formerly discourf-
ed of, *viz.* the not observing the right
method and order of payment. 4. By af-
fenting to a Legatee's having a thing be-
queathed, Debts being unpay'd. 5. By fel-
ling Goods of the Testator's at an under-
value; for (be the Appraifement what it
will, and let him fell for what he will) he
must stand charged to the beft and utmoft
value towards the Creditors. Yet if upon
a Judgment againft the Testator or the
Executor the Sheriff fell fome of the Te-
ftator's Goods at an under-value, this is
no Vaftation of the Executor, for this diffe-
rence *Hody* chief Baron makes. But fince
an Executor may haply prevent this act of
the Sheriff, by paying the due fum upon
fale of the Testator's Goods at the beft va-
lue or otherwife, he is to be blamed to
leave it to the Confcience of the Sheriff or
Under-Sheriff rather. 6. And laftly, this
may be done to the Executor's fmart by
undue, *viz.* not legal, difcharging of any
Debt or Duty pertaining to the Testator,
and that divers ways requiring heedful-
nefs. As if an Executor upon a Bond of
two hundred pounds forfeited for pay-
ment of 100 l. accept the Principal, or
perhaps alfo fome Ufe, Cofts, or Damage,

13 E. 3.
Fitz. 91.

Yet on the
other side, if
an Executor
by payment
of a 100 l.
get in a for-
feited Bond
of 200 l. it
shall be an
Administ.
but of 110 l.
27 H.8.6. P.
Fitz. inst.

and give a Release or Acquittal of the whole forfeited Bond, or of all Actions, or upon Record acknowledge Satisfaction upon Judgment had; this is a Wasting of so much as the penal sum is more then is received, and so far his own Goods stand liable to Creditors not satisfied: and so doubtless is it, if he do but give up the Bond, having no Judgment upon it, though he neither make Release, nor acknowledge Satisfaction. But his verbal Agreement to require or sue for no more, or his giving a Note of receipt for so much as he hath received, or delivering of the Bond into a friend's hands or into a Court of Equity in way of Security to the Debtor, that he shall not be sued for more, is no Devastation, since still the rest in Law remains due and suable. So this sets no more upon the Executor's score then he received. But let him take heed of Releasing, except he be sure there be no other Debts demandable. Nor onely is there danger in Releasing of Debts, but of Trespasses or other causes of Action also. As if one take away Goods from the Testator, or from his Executor; if the Executor make him a Release, this is a Devastation, and makes his own Goods liable to the

the whole value of the Goods released : as appears by *Russel's Case*, where the Release of an Infant, Executor to one who had taken and committed to his use Jewels and Goods of the Testator, being pleaded, the Release was therefore held void in respect of Nonage ; for that if it should have stood good, it had amounted to a *Devastavit*, and made the Executor's own Goods liable ; which, his Infancy considered, had been hard. Another way of discharging dangerous to Executors is, submitting matters of Debt or Duty, or touching Goods taken away, to Arbitrement. For if by the award of the Arbitrators the Debtors or Wrong-doers be discharged or acquitted without making full recompence, the rest of the value will (as to other Creditors) sit upon the Executor's skirts, because it was their voluntary act thus to submit it to Arbitrators. Thus may Executors fall under prejudice, not onely by wilfull Wasting or unfaithfull miscarriage, (wherein they are not to be pitied) but through incogitancy and unskilfulness also. Nay, I may say truly, that it is very hard for Executors in some cases to walk safely: for besides that, to find out all Judgments and Recognizances by or against

their Testators is of some difficulty more then for Statutes, whereof by search in an Office desery may be had ; yet with this difference, that Statutes-Merchant and Statutes-Staple may be and stand effectual against Executors, though not inrolled ; albeit against Purchasers of the Conorsors Land they be not of force, if neglect be of Inrollment within three months. But where Statutes or Recognizances lie for performance of Covenants upon Sale or Lease of Lands, Marriage, Agreements, or otherwise ; how hard is it for Executors to know whether any Covenant be broken or not ? how hard to be sure they find out all Bonds, Bills, Covenants and Articles in writing, made and kept by others, whereby any money is due and payable before Debts by Contract or Legacies, as also all Promises or Debts by Contract payable before Legacies ? For the Law hath prescribed no time for their claim and demand : and whether some such thing or mean of publication were not fit to be enacted, let the judicious consider. To attain to this knowledge of the Testator's Debts, I remember that it is by the Lord *Brook* reported, that in King *Hen.* the 8. his time Sir *Edmund Knightly*, being Executor

curator to Sir *William Spencer*, made Proclamation in certain Market-Towns, that the Creditors should come by a certain day, and claim and prove their Debts; but he for this was committed to the *Fleet*, and fined. For that none may make Proclamation, saith the Book, without Warrant or Authority from the King, except Mayors and such like Governours of Towns, who by Priviledge or Custom may so doe. But the dangers are onely where there is not sufficient of the Testator's Goods and Chattels to satisfie both Debts and Legacies. For where there is so, the Executor is not in any such hazard as aforesaid. This descry of Danger may breed Caution; and *Qui timent cavent, & vitant*.

As to the second, we shall have in consideration two sorts of persons, *videlicet*, 1. his Executors, there being many times divers Executors, and the Waste or Devastation done but by one; 2. the Executor's own Heirs, Executors and Administrators, *viz.* whether, he dying, this act shall fix upon them like charge and burthen for satisfaction, as upon himself should have lien in case he had lived.

Touching his Companions, though all together

Lib. Inrat.
fol. 327.
Kelw. rep.
fol. 23.
So 11 H. 6.
38. 2.
4 El. Dy. 2.
10. 2. the
Writ so is.
sued against
the Walter
onely.
P. 4 H. 8.
ret. 303.
Tr. 34 Eliz.
Pas. 36 Eliz.

together make but one Executor, yet the
 mis-doing of one shall not charge the rest,
 nor make their Goods liable to recom-
 pence : as both appears by the Book of
Entries, and was also held in the time of
 Henry the seventh, *Ann. 12.* of his Reign.
 Yea of the same opinion were the Judges
 twice in the late Queen's time, *viz.* first
 in a Case between *Walter* and *Sutton*, in
 the *Common Pleas*, and shortly after in
 the *King's Bench*, in a Case between
Hankeford and *Metford*; though these
 two Cases be not reported in Print. And
 surely this stands with rules of Reason or
 Justice, that each should bear his own
 burthen : If it were otherwise, many
 would decline and abandon Executor-
 ships, as very dangerous to the most ho-
 nest and faithfull, in case they were subject
 to racking by the miscarriage of their
 Collegues.

As for the Executors or Administrators
 of the wasting Executor dying before he
 have born the burthen of this mis-doing,
 I have found contrary opinions, even in
 the late Queen's time. For first, in the
Exchequer it was conceived to be as a
 Trespass dying with the person, as coming
 within the Rule, *Actio personalis moritur.*

cum persona. But in the said case of *Walter and Sutton* the Court of *Common Pleas* Mich. 31 & 32 Eliz. Tr. 34 Eliz. was of contrary opinion, viz. that this was not escaped by the death of this Misdoer, but the Law would pursue his Executors or Administrators, and lay upon their backs the burthen of Recompence or Satisfaction; for that the Testator or Intestate doing this wrong had made himself to be Debtor in the first Testator's stead, and therefore they who represent his person must with his Goods make amends and supply. And this later opinion was something in time after the former. Also between these two times was there an opinion in the said Court of *Common Pleas* agreeing in part with this later: For there a Judgment being had against an Executor, and the Sheriff upon the *Fieri facias* returning that there were no Goods of the Testator in the Executor's hands, and then this Executor dying, a *Scire facias* upon a suggestion of Devastation by the said Executor deceased was awarded against his Executor, and that upon good debate, and shew of a Precedent left, and reported by M. *Jennour* in King *Hen. 8.* his time. And it was then said to have been clear, that if a Devastation

Tr. 34 El.

Mich. 32 & 33 Eliz.

on

on had been returned in the life-time of the said wastfull Executor, his Executor then should have been charged. All the doubt was, for that here that was not done in his life-time; yet at last affirmatively (as above is shewed) the Resolution was.

Touching the third Point, *viz.* To whom the advantage of Wasting shall accrue, or who by reason thereof shall charge this wasting Executor: Put we the case the Testator stood indebted to *A* by Statute, and to *B*, *C* and *D* by Specialty not of Record, as Bond, Bill, &c. and the Executor having no more in *Assets* then onely an hundred pound, and this all being due to *D*, he payeth him the whole hundred pound, not having any thing left to satisfie any of the rest of the Creditors: hereby wrong is done to none but *A*, who was a Creditor by Statute, and therefore he onely shall make this Executor to pay the like summe out of his own Goods, since as to him onely this is a Devastation, or that it was at his election to pay off the other Creditors, which he would, no Suit being commenced by any of them, consequently no wrong was done to *B* nor *C*. And if no
such

such Debt had been by Statute, but all had been Creditors by Specialty, and *A* onely had commenced Suit, and that known to the Executor; now if after he payed all to *D*, He stands onely as to *A* liable in his own Goods, and not to *B* nor *C*. But if the Executor had onely paid a Legacy or Debt by Contract, leaving nothing for satisfaction of the Debts by Specialty, then had he stood equally liable to each of the other Creditors. *Capiat qui capere potest*, viz. He who first couldre cover, or by the voluntary act of the Executor could obtain payment, must be preferred, if the summe would reach no farther. For it shall by this mispayment, or misconversion, stand with the Executor as if he had not payed it nor departed from it at all upon the matter; and therefore I doubt not but it is free for him to give the advantage of this his error to which Creditor by Specialty he will, so as he shall stand free from all the rest, no surpluse remaining, nor any Creditor of Record being. For if there be any Debt upon Record, the Executor sued by a Creditor upon Bond may, notwithstanding this his Wasting, plead in bar of this Suit, that there is such a Record of a Debt not satisfied,

If upon fully administred pleaded to one, *vel aliter*, he have the advantage of this Wasting, taking up the whole Sum wasted, *Que.* how the Executor shall relieve himself against another.

tisfied, and that he hath no more then that Debt amounts unto, and so admit so much still in his hands as he hath mis-administred, though in kind it be not in his hands, but mis-spent, or unduly payed, as aforesaid. And what is before shewed of the Statutes precedency before Bonds, in taking the advantage against an Executor for devasting or wasting, the same is to be understood of precedency of Judgments before Statutes, and of Debts to the King before Judgments, &c.

As touching the fourth Point, *viz.* How far the Executor thus wasting shall incur damage or make his own Goods liable; Doubtlesse, no farther then the value of the Testator's Goods wasted or mis-administred. Therefore if one have advantage thereof to the full summe, no other after shall; for he is no farther a Trespasser or Wrong-doer, nor is the Testator's Estate any farther or deeplier damnified. And as Damgages for Trespass are to be proportioned to the value of the Wrong done and loss sustained; so also in this case the Executor by his mis-doing doth not draw upon himself his Testator's whole Debts, but so much onely as the Goods amounted to which he did mis-

mis-administer, and which should have gone to the payment of the Testator's Debt, if he had not so misguided himself in the office of Executorship; which default he must repair or make good. And this proportion seems to me proved by the Case in *K. Edw. 3.* where the value or quantity is found, especially of the Goods administred wrongfully, though there by a wrongfull person: and in *Sutton's Case* it was expressly held, that each Executor should answer for so much as he wasted. 41 E. 3. 31.

Now for the fifth and last Point, *viz.* How and in what manner Relief shall be had upon this point of Wasting, for him to whom it pertains: First, this is to be observed, That in case where the Verdict passeth directly against the Plaintiff, no Devastation can come in question, for that no Judgment being for the Plaintiff, no Writ of Execution can issue; and therefore, if upon the issue of Fully administred it shall appear that there hath been a Devastation, which causeth *Assets* to fail, then must the Jury find that the Defendant hath *Assets*, and not find a Devastation, as was resolved in the *King's Bench* in the late Queen's time between *Hankford* and *Melford*: for there the Jury find-

ing

*Faf. 36 El-
in 6. reg.*

ing a Devastation, *viz.* a Surrender of a Lease for years left by the Testator, it was held void and nugatory, and was not regarded by the Court, which said that must come in by the Sheriff's Return, *viz.* upon the *Fieri facias*. Thus *Assets* being found in the Executor's hands, Judgment is given for the Plaintiff to recover his Debt, and to have it levied of these *Assets*: nor is this finding of them by a Jury against truth, though they be wasted, and so not to be had in kind; for the Executor hath them in right, since he hath not rightfully parted from them; according to the Rule, *Pro possessore habetur qui dolo (or injuria) desit possidere*. As in the Case first put this Wasting cannot come in question for want of a Judgment for the Plaintiff; so also where the Judgment it self extendeth to the Executor's own Goods by reason of some false Plea, whereof we shall after consider: for since that the consequence and effect of a Vastation is but to make the Executor's own proper Goods liable to the Debt of the Creditor, this is altogether needless where the Judgment it self hath laid hold on his Goods. But now in case where the Judgment extends onely to the Testator's Goods

Goods in the Executor's hands, let us find the way to relieve the Creditor, in case the Testator's Goods be wasted by mis-administring or otherwise; for hereabout the right way hath often been missed, and again easily may be. In the latter end of the late Qu. time, this course was taken, *viz.* The Sheriff returning generally, that the Executor had no Goods, a Surmise was entered, that the Executor had converted to his own use the Testator's Goods, whereupon a Writ was awarded to the Sheriff to enquire thereof by Jury or Enquest, which he did, and returned, that it was found that the Executor had wasted the Goods; and thereupon a *Scire facias* was awarded against the Executor, to shew cause why Execution should not be of his own Goods; and upon two *Nihilis* returned, Execution was so awarded: but a Writ of Error was hereupon brought. And although it were said, for defence of that course, that it was usual in the *Common Pleas*, and more favourable then the other course, where the Sheriff onely returneth the Wasting, or is sole Judge thereof, whereas here it was found by an Inquest of Jurors, and thereupon a *Scire facias* awarded; yet did the Court resolve

49 El. Pet.
tifer's Case.
Co. lib. 4.
fol. 32.

So 9 H.6.
f. 9.

See Pastons
11 H.8.16.
26. upon
surmise that
A hath wa-
sted, a *Fieri*
facias may
issue against
his Goods
onely, if so,
&c.
Solib. 11.
fol. 11.

resolve the contrary, and reverse this Execution as erroneous : for it was said; that upon the Sheriff's return of *Nulla bona*, viz. that there were no Goods of the Testator to be found, the Plaintiff should have a special Wait of *Fieri facias*, willing the Sheriff to levy the sum recovered either of the Goods of the Testator, or if it could appear that the Executor had wasted the Testator's, then to levy it of his own Goods. And this way, as was said, the Executor hath good remedy by Action against the Sheriff, if without just cause he levy it of his Goods; but the other way, viz. when Inquest is thereupon taken, the remedy fails, since neither the Sheriff doing according to the Inquest can be punished, nor the Jurors finding falsely are subject to any Attaint, it being no Verdict upon Issue joyned, but an Inquest of Office, which excludeth also all challenge of Jurors. And whereas that Book mentions the Sheriff's subjection to Action onely in case of his mis-feasance or doing wrong; I conceive that he is likewise suable for omission or non-feasance in this case, viz. for not levying the Debt upon the Executor's own Goods, where proof is made
of

of his Wasting. And where the Book mentions this *Fieri facias* to be in this manner upon the Sheriff's return in a *Sci-re facias*, doubtless the Book therein is mis-printed, and should be a *Fieri facias*; for in a *Sci. fac.* the Sheriff can return nothing but that he hath warned the party, or that he hath nothing whereby he may be warned. This then is the course there prescribed, that first a general *Fieri fac.* go out, and that thereupon the Sheriff return generally, that the Defendant hath no Goods of the Testator's, and that thereupon the said special Writ is to issue. Yet in the beginning of the late Queen's time, the Verdict passing for the Plaintiff upon the Issue of Fully administered, the Sheriff was not permitted to make such a general Return of no Goods to be found of the Testator's, but was enforced by the Court upon good advisement either to levie the Debt, or to return a *Devastavit*: and so it was done at last by the Sheriffs of London, much against their mindes; and thereupon went out a Writ to levie the Debt of the Executor's own Goods, first in London, and after into *Devonshire*, upon a *Testatum* that the Executor had Goods there. And it was there said, that

2 El.D.185.
VVoodw.
and Chiche-
ster's Case.

if no Goods could be there found, then the Plaintiff might have a *Capias* to take the Executor's Body in Execution, or an *Elegit* for the moyety of his Lands. But certainly I cannot finde (except with a difference) how this course of inforcing the Sheriff to doe one of these two can be just; as neither could Justice *Fulthorp* in the time of K. *Henry* the sixth approve it. For a Jury of one County may finde *Assets* in another County, as was resolved in the time of K. *Henry* the 8th, which yet was understood of Goods moveable, and not of Lands. This then thus being, if a Jury of *Kent* find *Assets* which be in *London* or *Essex*, how can the Sheriff of *Kent*, where the Action was laid, levie the Debt recovered by or out of these Goods? or, since he cannot, why should he be compelled to make a false Return of a Wasting, when the Goods remain unspent and unwaisted in another County? Why rather should he not be suffered to return according to truth, that there is nothing within his County or Bayliwick whereof the Debt may be levied, since even his Oath tieth him to make a true Return? Nor is this contrary to the Verdict, finding *Assets* generally; and

11 H. 6. f.
28. 28. H. 8.
Dy. 3. Yea
Co. lib. 6. f.
47. 48. *Assets* in *Ireland*, or
elsewhere
beyond the
Sea, may be
found by the
Jury where
the Action is
laid.

For the Pl.
may, if he
will, suggest
the being of
Assets in a
foreign
County, and
this is usual-
ly done.
See *lib. intro.*
II. a. Action
upon the
Case for a
false Return
of Devastat.
contra sac.
fui debitum,
28 H. 8.

and this so returned upon a *Testatum*, the Process may be directed into the right County. But in the said Case it was replied to the Plea of Fully administred, that there were *Assets* in *Essex*, the Action being laid in *Middlesex*; and yet, as it seems by the Book, the Trial was to be by a Jury of *Middlesex*, which; saith the Book; may find the *Assets* in *Essex*: but there the Plea was demurred upon, and held a good Plea; which proves, that although the transitoriness of the *Assets* makes them subject to the notice of a foreign Jury, yet is it not like an act transitory, and not local, for that must be pleaded to be done in the place where the Action is laid, though in truth not so. But had Issue been joyned upon the point, methinks it should be tried in *Essex*, where the *Assets* be laid; the rather, for that perhaps they may be real Chattels, *viz.* Lands leased to the Testator, or other Lands of him appointed to be sold for payment of Debts, which, as heretofore hath been held, a Jury of another County cannot finde. Besides, although such a foreign Jury may finde other movable *Assets*, yet is it at their election, they are not thereto compellable, as elsewhere is holden. Here then

2 *Ma. Bro.*
Attaint 104.
 & 10 *El.*
Dyer 271.
 Because local & fixed;
 otherwise
 held, 3 *fac.*
in com. ba.
Co. lib. 6. f.
 46, 47.
 22 *E. 4. 9.*
 & 2 *Ma.*
Bro. Att.
 104. 18 *H. 7.*
Kelw. rep.
 51. a. So held
 P. 31. *El.*
in Scaccar.

The Office of

may be the difference, viz. That if the *Assets* be found to be in the County where the Triall is, there the Sheriff of that County cannot return *Nulla bona*, without adding, that the Executor hath wasted : but if there be no Verdict at all touching *Assets*, Judgment passing against the Executor upon a Demurrer, Confession, *Nihil dicit*, or the like ; there may the Sheriff make such a Return of *Nulla bona Testatoris*, without returning any Devastation : and so also where the Verdict either findeth *Assets* generally, not finding in what place they be ; or expressly findeth them to be in another County, as a little before we found may be done by a Jury of London of *Assets* in *Essex*.

So if the Process for Execution go into another County then where the Verdict found, as the difference was held in

Scac. 31 El.
28 H.8. Dy.
30. b.
Pas. 4 H.8.
rot. 303.

4 El. Dyer
210.

But 3 H.6.
12. without
any *Sci. fac.*
upon the
Devast. re-
turned, a
Capias was
awarded by
the Court ;
and see 9 H.
57. Bro. Ex.
57. & Lib.
1117. 320.
A *Fieri fac.*
absolutely
and without
condition.

In King Henry the 8th his time, as a little after the said *Chichester* is by the Lord Dyer reported, the Sheriff returning upon the *Fieri facias*, that the Executors had no Goods of the Testator's, did add in the same Return, that one of the two Executors had wasted, and thereupon a *Sci. fac.* was awarded against him ; & upon *Sci. feci* returned, & Default made, Execution was adjudged, and awarded against his Goods only. And this course of *Sci. fac.* both the L. Dy. (as elsewhere I find it reported) & *Prisot temp. H. 6.* approved. But

I am

I am perplexed with doubt what Plea the Executor coming in upon the *Scire facias* could plead; for except his deniall of Wasting might be pleaded contrary to the Sheriff's Return, and put in Issue, so as to cause a new Triall after a former, perhaps preceding, Judgment, which I think would not be admitted, then his coming in is to little purpose, for ought I can conceive. Here again it must be observed, that in the Case of *Chichester* the Judgment was had upon triall of Fullyadministred; but in the other Case in the time of King *Henry* the eighth it was upon Confession; which is all one, as I take it, with condemnation upon Demurrer, or *Non sum informatus*, or Triall upon *Non est factum*, to the Bond, or a Release to the Testator, or the like. Now between all these and that of *Chichester* there is a broad difference: for there the Defendant being convinced by Verdict to have *Assets*, which if they continue not in his hands in kind must be answered out of his own Goods as wasted, therefore the *Fieri fac.* to levy the Debt of the Testator's Goods, if any found, or in default thereof out of his own Goods, is very agreeable & pursuant; but in none of the other Cases is there any such Trial or conviction of the Defen-

So 9 H. 6.
49, 50. A
manuscript
report.
36 H. 6. 3.
And Mor-
dant, 12 H.
7. Kelw.
rep. 24. But
Vavasor
Just. and all
the other
Serjeants &
contr. 2 El.
D. 185.

Co. lib. 5. fo.
31. Mic. 41
Eliz. rot.

2. 4.

Co. lib. in v.
266. b. A recovery of
Debt precedent was
pleaded: Pl.
replied *Nihil*
in Record,
and Defend.
would not
maintain his
Plea. *Idem*
condemp. If
neither, he
must so re-
turn, and do
nothing.

dant's having *Assets*, so as it rests *agere dubium* whether they have *Assets* or not : and therefore it may seem somewhat hard and harsh to send out such a Writ in that Case ; and so should I have thought, if I had onely seen the Report of *Pettifer's* Case. But looking into the Record, & finding the Condemnation there to be by *Nihil dicit* in effect, I cannot uphold any distinction of course in respect of the said difference of Cases. Nor indeed doth that course there directed presume that the Executor either hath *Assets*, or hath wasted them, but commands that if *Assets*, &c. then the levying shall be one way ; if Wasting, then another way : so if neither, *Nihil fiend*.

CHAP. XIV.

Of an Executor of his own wrong.

TO begin with some definition or description of this man ; He is such as takes upon him the Office of an Executor by intrusion, not being so constituted by the Testator or deceased, nor for want

want of such Constitution substituted by the Ordinary to administer. Touching whom we will consider in these parts, and with this method, *viz.*

1. What acts or intermeddlings of such an one, not being Executor nor Administrator by right, shall make him to become an Executor by wrong. *Vide* five more, *per Stat. 43 El. cap. 8.*

2. In what manner and by what name such shall be sued, specially when another then he is Executor or Administrator, or himself after such act becomes Administrator.

3. How far he becomes liable to Creditors, and how, and to whom.

4. What acts done by him shall stand firm as if he had bin an Executor by right.

5. See a late Stat. 43 *El. cap. 8.* hereabout.

As to the first, it was in the time of Queen *Mary* doubted, and not resolved, whether the onely seising and taking into one's hands the Goods of the deceased did make one Executor of his own wrong, without any farther act. And in the beginning of the late Queen's time the *L. Dyer* said, that the possession and occupation of or meddling with the Goods is that which gives notice to Cre-

I. Point.
1 & 2 P. &
M. Dy. 103.
b.

1 El. Dyer
166 & 167.
So also Bel-
kn. 50 Ed.
3, 9.

ditors whom they are to sue as Executor. But doubtless Creditors must look farther before Suit; for else can they not know whether he so intermeddling be Executor or Administrator; nor consequently how to found their Suit rightly and safely for good success; since a Suit against an Executor as Administrator, or against an Administrator as Executor, will prove ruinous, and fall to the ground. Yea where an Administrator sued as Executor did not plead that Administration was committed unto him, but generally denied that he was Executor, or administered as Executor; the Lord *Dyer* held that it must be found for him, yet left it doubtfull: but the clear and safe way had been to have pleaded the Administration, &c. And in the former Case the Lord *Dyer* said, that one intermeddling only about the Funeral, and laying out money therefore, an Overfeer or Conductor, or he who hath Letters of the Ordinary *ad colligend. viz.* to get and keep the Goods in safety, and one who intermeddleth by virtue of a Will truly made, but controlled by a latter Will after found and proved, may free himself from being an Executor of his own wrong, by special plead-

13 & 14 El.
Dy. 305, 306

1 El.D. 166,
& 167. See
Lib. inty.
322. b.

Pleading how or in what right he intermeddled, and traversing his Administring in other manner : and that this Traverse need not, nay may not be, was held in the time of King *Henry 6.* and *7.* for that such acts amount not to any Administring at all ; and where no Administring at all is confessed, such a Traverse of not Administring in other manner is dissonant, and not legal. But let us look back upon these severall points exempted by the Lord *Dyer*, and we shall see some cautions necessary touching them and their safe entertainment. First, as touching the point of Burying the dead, it must be understood to be with some expence of the deceased's Goods, and so it is expressed in the said Book of *Hen.* the *6.* his time : else for a man out of Charity to lay out of his own mony (not intermeddling with the Goods of the deceased) to bury a friend, hath little colour to involve him so doing in an Executorship by wrong. Taking the Case then, that such person laies out or expends of the deceased's Goods or mony upon his Funeral, heed must be taken touching the measure and proportion whereabout. Though I can give no particular and distinct limit, yet doubtlesse

12 H. 6. 28.
10 H. 7. 28.
Yet *Lib. intra.* 321. b. where he confessed about Funeral, he traversed *aliter. Lib. intra.* 321. where by Letter *ad collig.* he traversed, *Absq; hoc quod & Exec.*

21 H. 6. 21.

lesse either meer necessity, viz. Church-duties, &c. or at least decent Sutable-nesse to his quality, must be the bounds. And herein to speak as I think, this latter must either be utterly excluded, or held within very narrow compasse: for what reason that a Knight or man of higher quality, leaving (though perhaps entailed Lands of good value) yet Goods not sufficient to pay his Debts, should have an hundred pounds or more of that which should satisfie Creditors spent in pompous interring of him for his Worship and reputation? Next, Overseers may onely be excused for seeking to preserve and keep the Testator's Goods, not in case they expend or dispose thereof. So also for him who is authorized by the Ordinary to collect, for if he sell or dispose of any, (though Goods otherwise subject to perishing) it makes him an Executor by wrong, as was resolved in the late Queen's time, notwithstanding that by the Ordinarie's Letters he was expressly directed or warranted so to doe; for it was said, the Ordinary himself could not so doe. As for him who administred by virtue of a Will after disapproved, or controlled by a Letter, he must

*Lib.int. 322.
8 & 9 Eli.
Dyer 355,
256. He sold
blended
Corn, but
there he
pleaded not
the special
matter.*

must not doubtlesse stand free for the Goods before administred, but either as rightful or wrongful Executor stand liable to the Creditors. Nor doth every such intermeddling by one out of all these excuses and evasions as would be an Administration, make one an Executor by wrong. If one do but take an Horse of the deceased, and tie him in his House or Stable, this makes him not an Executor, saith *Paston* a Justice, or like acts or intermeddlings; as he that delivers to the Wife of the deceased her Apparel, at least if it be no more then is convenient to her degree. But if she take, or another deliver, more then such to her, she or he becomes an Executor by wrong. But now let us come to a difference, where there is a rightful Executor, and a Will by him proved, or Administration committed; for there such light acts or intermeddlings shall not make one an Executor by wrong, as where there is no other of right to be sued. As if one take Goods wrongfully from such a right Executor or Administrator, this (though he convert them to his own use) makes him not an Executor by wrong, but a Trespasser to the right-

1 & 2 P. &
Ma. Dy. 183.

21 H. 6. 28.

33 H. 6. 32.
1 Eliz. Dy.
166.

Tr. 37 Eliz.
by *Fenner*.
Just. If one
doe any
such act as
pulls the
Property
out of the
Executor,
he is become
an Executor
by wrong.

If the Goods
be aliened
by fraud, he
who takes
them after
the Execu-
tor's death is
an Executor
by wrong.

Tr. 37 Eliz.

D. 5 E. 4.

72. a.

Tr. 2. Jac.
in com. b.

Co. lib. 5.

53 & 54.

1 Eliz. D.
160. b.

7 H. 5. 20.

rightfull Executor or Administrator, who even for these Goods, once *Assets* in his hands, stands liable to Suits of Creditors, they being neither lawfully evicted nor rightly administred: but in case there had been no Executor at that time, or no Will proved, nor Administration committed, then such taking of the deceased's Goods into a strange hand had made an Executorship by wrong. And thus was the difference lately resolved, as is reported by the *L. Coke* in the Case between *Read* and *Carter* in the *Common Pleas*.

Yet this farther difference was there held, *viz.* That although there be an Executor or Administrator by right, yet if a Stranger take upon him to receive Debts and make Acquittances, or to pay Debts, claiming to be an Executor, he is suable as an Executor by this Act: and so also in the late *Q.* time was held by 6 Just. as touching the receipt of Debts and making Acquittances; but the Book mentions not whether any other Executor then were, or not. But in the point of bare payment of Debts *Frowick* makes another difference, *viz.* If a Stranger do with his own money pay the Debts of a Friend deceased, and not with the Debtor's; this is but

but an Act of Charity, and makes him not an Executor by wrong : otherwise, if with the Debtor's money. Yet to this another difference must be added, *viz.* That if he thus paying with his own money, have taken into his own hands Goods of the deceased ; then is his payment presumed as by or out of the value of these Goods, and so makes him an Executor by wrong. Contrarily, if he have no such Goods in his hands. And in the point of intermeddling with and disposing of the Testator's Goods, where another Executor is, this farther difference is to be added or understood, *viz.* That where the Goods so taken never came actually to the Executor's hands, but were in a remote place, there this taker becomes Executor. For as it were mischievous to the Executor, if he should by a possession in Law cast upon him stand chargeable with these Goods in remote places purloyned, as *Assets* in his hands ; so were it as mischievous to Creditors, if neither Executor by right, nor this Stranger as an Executor by wrong, should stand liable to Creditors for them. It is true, that the right Executor may sue and recover Damages for them, and that so recovered shall be

Assets ;

Assets ; but the Creditor hath no mean at the Common Law to inforce him to sue, and perhaps it may be a cold Suit. And with these Additions I think that late resolved difference may stand firm and sound. Yet in former times, without such difference, the taking oney and possession of the Goods of the deceased was held to create an Executorship by wrong; as *Belknap* said in the time of King *Edw.* the third; and especially if the Act were such as removed the Property of the right Executor, as Justice *Fenner* in the late Queen's time said, *teste meipso*.

50 E. 3.
fol. 9.

Tr. 3. Eli.

How and by what name Suit shall be against such and the like.

2. Point.

L. 5 E. 4.
72. Co. lib.
5. 30, 31,
& 32. b. 21
H. 6. 8.

Touching the second Point, viz. In what manner Suit shall be against such: First, in general, this usurping Executor is not in Suit to be distinguished by name from the right Executor, but to be sued generally by the name of Executor of the last Will and Testament of the Defunct; and then if he will deny himself so to be, he must plead that he neither is Executor, nor hath administered as Executor. Then the Plaintiff must

must prove that he hath administred in some such or the like sort as aforesaid. And it hath been divers times held, that where there is a right Executor, and yet another doth administer by wrong, it is at the election of Creditors either to sue them jointly together, or one or both of them severally and by himself. But if where Administration is committed, another also administers by wrong, these cannot be sued together as Administrators ; for though one may be an Executor by usurpation or wrong, yet none can come to be an Administrator by wrong, since no other but such as receiveth that power from the Ordinary can so be : therefore in that case there is a necessity of suing him apart and by himself (who so usurpeth Administration) by the name of an Executor.

So if *A* administer the Goods of *B*, not being Executor nor Administrator, and after his such doing, and disposing of the Goods, he obtaineth Administration of the Goods of *B*, but the Goods left or coming to his hands since the Administration committed suffice not without the other Debts received or released, or Goods sold before, to satisfie Creditors : now
if

Co. li. inira.
154. But
145. a. in
the Verdict
he is called
Exec. de
injuria sua
propria. 39
H. 6. 45,
46. 21 H. 8.
8. 19. 9 E. 4.
14, 15. 1 &
2 P. & M.
Dyer 165.
33 H. 6.
38.

25 H. 6. 31.

R. 3. 23.

21 H. 6. 8.
If the Administration
were committed before
the Suit began, the
VVrit shall abate, else
not, as was of old conceived.

if any sue *A* by the name of Administrator, he shall have no farther Relief then according to the value or extent of the Goods left in or come into his hands since the Administration committed; and if those be fully administered, he shall get nothing; if they remain unadministered, but amount not fully to his Debt, he must want so much of satisfaction; and if he will be relieved, or satisfied out of the Goods before disposed of, he must sue *A* as Executor of *B*. And so was it ruled and resolved by *Gawdy* and *Suit*, Justices in the *King's Bench*, in the late Queen's time, viz. *Tr. 30 Eliz.* And if this now Administrator will plead in Abatement of this Action that Administration was committed to him, and demand Judgment, if Suit shall be against him as Executor, then the Plaintiff must in the Replication, as I take it, set forth the special matter, viz. how the Defendant did administer before Administration to him committed. But if one to whom Administration is committed doe devast, and this Administration is by Suit repealed, because he was not the next of kin, and Administration is committed to another; now a Creditor who would be relieved out of the

the

the Goods wasted, must sue that first as Administrator, and not as Executor of his own wrong, said *Popham* Chief Justice, for he did rightfully administer for that time. *Vid. 8. 183.*

AS for the third, *viz.* How far this Executor of his own wrong becomes liable and obnoxious to Suit; consider we these things. *3. Point. How far liable to Creditors.*

First, he becomes subject both to the Action of the Executor, who hath right to the Goods wrongfully intermeddled with all by him, though it were before proving of the Will; and also to the Action of the Creditor, who hath right to the Satisfaction of his Debt,

Secondly, as touching the measure how far he is engaged, doubtless he is not by his wrongfull Administring become chargeable with the whole Account of the Testator's Debts; but onely so far, and with so much thereof, as the Goods which he so wrongfully administred amount unto. (Yet he must look to his Plea, else by it he may draw all sued for upon himself; as if he deny his being Executor or Administrator.) And this seems to me proved by the Case in the time of *Edward* the third, where the Inquest found

Co. lib. intr. 144, 145. Plm de boc

not onely the Administring or intermeddling by the Executor wrongfully, but found also, by direction of the Court, (as it seemeth) what the value was of the Goods so wrongfully administred, which had not been material, if the Administring of a peny had made one as far chargeable as the Administring of a pound. Besides, if it be so that a rightfull Executor wasting Goods of the Testator to the value of 20 *l.* shall be no farther charged then that value, then doubtless so shall it be also in this case, for both be wrongfull Administrations: onely this difference there is between them, that in one case the Administration is by a wrong person, and in the other case in a wrong manner. Nay, the Lord *Dyer* doth not stick to call him who administreth wrongfully, or in undue manner, expressly an Executor by wrong, in the Case of *Stocks* against *Porter*, though he were rightfully Executor, because he did dispose or execute wrongfully.

1 *El. Dy.*
167. *cap. 12.*

4. *Point.*
What acts of
his of for. e.

AS to the fourth, *viz.* What acts done to him or by him who is an Executor of his own wrong shall stand firm and good, as done by or to the right Executor:

cutor : Suppose, first, that the deceased were indebted to him 20*l.* who thus usurpeth Executorship, whether may he pay himself or not? And this point was in debate in the *King's Bench* between *Coulter* and one *Ireland*, Executor of *Hunt*, where it was strongly objected, that notwithstanding the rightfull Executor or Administrator might punish him, and recover against him, for the Goods which he administreth; yet another Creditor suing him as Executor generally, and so affirming him to be, (for there is no special form of Writ or Declaration to distinguish an Executor by wrong from a rightfull Executor) he stands as against him in the state of a rightfull Executor, and therefore may first pay himself before he pay others: and of that mind at the first were *Fenner* and *Gandy* Justices; yet did they admit that this payment should not stand good as against the rightfull Executor or Administrator. And *Popham* and *Clinche* held strongly, that neither should it stand good against other Creditors; for then every man would rush upon the Testator's Goods, and be his own Carver in payment. And whereas it was said at the Bar, that the Lord *Anderson*, upon an Evidence at

*M. 40, 41 E.
Co. lib. 5 f.
30.*

Guild-hall had ruled it otherwise, *Popham* at another day of debate of the said Case related, that the Lord *Anderson* did deny that he ever so ruled, or was of that opinion; and farther informed, that both he and Justice *Walmsley*, *Periam* and *Clark*, Barons, did agree with *Popham* and *Clinche* in opinion. After which, Justice *Gawdy*, as also *Fenner*, if I mistake not, changing their opinions, and concurring with the rest, Judgment was given accordingly. In the debate of this Case question was made, If such an Executor by wrong pay a Debt to another Creditor by Specialty, whether this shall not stand firm and good, since he stands liable to Creditors so far as the Goods by him administred do amount. And it was agreed, by the better opinion at least, that this should stand firm and good; so as if the payment were out of his own Goods, he might retain to himself in lieu thereof so much of the Goods of the Testator: for here he doth not, as in the other Case, advantage himself by his own wrong. Yet that opinion, allowing this payment to Creditors, must, as I think, be understood with this difference, *viz.* that this payment shall stand as against other Creditors, but not as against the right

right Executor or Administrator : for then any Stranger might usurp the Office of Executor, and take from him that liberty and election, to prefer which Creditor he will in first payment ; yea, might take from the Executor power to pay himself before other, in case there were a Debt due to him, which were very unreasonable.

*Of Addition and Alteration by the Statute
43 Eliz. cap. 8.*

WE having considered what the Com- 5. *Point.*
mon Law is and willeth in the
Premisses : let us now see what Alterati-
on or Addition a late Statute hath made.
In the last Parliament of the late Queen
Elizabeth, consideration being had of sub-
tile getting into mens hands Goods of an
Intestate by Deed of Gift, or Letter of
Attorney, from one of small or no ability, to
whom such subtile Contriver hath procu-
red Administration to be committed, and
so himself would stand free from the Suit
of Creditors, the Administrator himself
either not being to be found, or not be-
ing of any value to satisfie Creditors ; it
was therefore enacted, that every person
receiving or having any Goods or Debts

of any Intestate, or any Release or Discharge of any Debt or Duty belonging to him upon any Fraud, as aforesaid, or without consideration of or near the value, (except in satisfaction of some just and principal Debt, to the value of the Goods or Debts due from the Intestate) shall be charged as Executor of his own wrong, so far as the value of those Goods and Debts amount, deducting all principal just Debts to him due, and Payments by him made, which a lawful Executor ought to have paid. Here have we a touch of all the parts precedent, or at least three of them.

1. We have first a new Executor by wrong, though intermeddling under the title of an Administrator.

2. We have a limit of the Charge by him incurred, suitable to our former expression.

3. Lastly, we have to him an allowance of Debts owing to himself, or duly paid to others; which is more than we have conceived allowable to another Executor by wrong.

CHAP. XV.

*Of Pleas by Executors, and which be best,
which most prejudicial to them.*

Since amidst the Pleas pleaded by Executors there is such difference, as that some induce one kind of Judgment, some another, some drawing more loss and burthen upon Executors then others: let us consider of the differences, so as light may be taken to chuse the safest or fittest for each case.

If an Executor do utterly estrange himself from the Executorship, saying, that he was never Executor, nor ever administered as Executor, (for that must be added) then if the Issue be taken upon the Plea, and it be found against him, the Plaintiffs shall have Judgment to recover, not Damages onely, but even the Debt it self, out of the proper Goods of the Executor, if none of the Testator's can be found to satisfy it. And this shall be thus not onely where it is found that the Defendant was made Executor by the Will, and proved it, and so could not chuse but know it; but even also

Plea denying the Executorship,
21 H. 6. 19,
20. Bro. 62.
2 E. 4. f. 4.
29 H. 7. 15.

Lib. int.
322, 333.
33 H. 6. 33,
34.

where he had never proved the Will whereof he was made Executor, nor ever Administred by virtue thereof: yea, though he did before the Ordinary refuse to be Executor of this Will, or to intermeddle with the Execution thereof; yet if any other named Executor with him did prove the Will, or did not refuse to be Executor, let such other Refuser take heed of pleading that Plea. For truth is against the first part of his Plea, *viz.* that he never was Executor; and so the Verdict, which must be *Veritatis dictum*, must needs pass against him, and make his own Goods liable as well to Debts as Damages. What if no other were made Executor but this onely who refused before the Ordinary? may he safely plead that he never was Executor? I think not, since he so was Executor before his Refusal, that he might have released all Debts due to the Testator, and given away all his Goods; therefore I think he must plead specially, shewing his Refusal, and not generally deny his being Executor. Nay, admit he never was once named, made, or intended to be made Executor, yet having pleaded this Plea, that he never was Executor nor administred as Executor, if it shall be found by Verdict that he

He was su-
able as soon
as the Te-
stator was
dead.

he did administer or intermeddle as Executor, the same blow or burthen falleth upon him : for then the latter part of this Plea is found untrue, yea the whole upon the matter, for by this Administring he became an Executor of his own wrong, and the deniall of this Executorship by wrong or usurpation shall be as penall to him as the denial of a rightfull Executorship. The like Law, where the Executor pleads a Release made to himself, or a Payment of the Debt, or other performance of the Condition made by himself. Nay, I find in this latter Case the Judgment entred generally against the Defendant, as against another for his own Debt, not being Executor. And the reason why the Law makes these so penal to an Executor is, because his Plea is not onely false, but the falshood thereof was wilfull, since it must of necessity be known to himself to be so. And lastly, for that all these Pleas, if they had proved true, had been perpetual Barrs, at least against the Defendant : the first indeed had not been a Bar against another, being in truth Executor or Administrator. But if the Executor had pleaded a Release made to his Testator, finding such a one among his Writings, which

But if he did it as Administrator, it is otherwise ; yet see that specially pleaded *Co. lib. Int.* 148. a.

See *Co. lib. Intrat.* Judgment so entred. 145. b. Read and Carter's Case.

Co. lib. Intr. 29. a. not first *de bonis Testatoris* si, &c.

See *Bro. Ex.* 22. these reasons for this diff.

33 *H. 6. 23,* 24.

So of other
perform. Co.
Lib. intr.
153. and
6 E. 4. 1. 7
E. 4. 8. See
Br. Ex. 22.
That the
Book con-
trarily re-
ported 34
H. 6. 32, 23.
is errone-
ous, as was
decried by
Fitz. & al.
23 H. 8.
the Record
being not so
as the Book
saith the
Judgment
was.

which yet was either forged, or never both sealed and delivered by the Plaintiff as his Deed; or if he plead payment made by his Testator; neither of these Pleas found against him shall cause the Judgement to fasten upon his own Goods: so if he denied the Bond or Bill, whereupon the Suit is grounded, to be the Testator's Deed. For in all these Cases the truth being not known to him, he might honestly and reasonably conceive it to be as he did plead. But what if he plead Fully administered, and this be found against him, which rested in his own knowledge? shall not this false Plea expose his own Goods, in defect of his Testator's, to the satisfaction of this Debt? No, it shall not, for that though this were a false Plea, and that within his own knowledge, yet was it not a perpetual Bar; for if it had been so found as was pleaded, yet *Assets* coming after to the hand of the Executor, the Plaintiff should then have Relief and Satisfaction out of these since accrued *Assets*. If any ask how *Assets* may after come, I will give him two or three instances. First, it may be by recovery of Debts before withholden or of Damages for Goods taken away,
or

or by voluntary payment of a Debt not before due, for that the time of payment was not come. Secondly, if the Testator, having a Lease for twenty years, did demise the same to *J S* for the whole term, if he so long should live; if he were alive in time of the former Verdict, but now is dead, the term continuing; this is now *Assets*, which before was not, whilst it was but a possibility of a term. Other instances might be given, but these may suffice. If the Executor pleaded that the Testator stood bound in such a Statute, or that there was such a Judgment against him of Debt to the King, beyond the satisfaction whereof the Goods would not reach; this is in effect a Fully administered, though special, and not general; and the Law is alike (as I take it) in all these cases, as to the not making of the Executor's Goods liable. But in all these cases, though the Debt shall not be adjudged upon the Executor's own Goods, yet the Damages shall, in default of the Executor's Goods to satisfy them. And in these cases it is not material whether the Judgment passed upon Trial or Demurrer. Nay, if the Defendant Executor plead no Plea, but confess the Action generally,

or

Lib. intr.
 148, 149.
 This good,
 though the
 judg. were
 by *non sum*
inform. and
 an averment
 that it was
 without Co-
 vin.
Co. Lib. intr.
 152.
 11 H. 4. 6.
 There a *Cap.*
ad sat. was
 awarded for
 the Damna-
 ges.

But he may,
I think, for-
bear so to
doe, and to
the Judg-
ment for
partial,
that when
more *Assets*
come, he
shall have
more. *Lib.*
Inrat. fol.
223.

Fol. 542.

or be condemned by *Non sum informatus*; the Judgment is the same, *viz.* to record the Debt onely out of the Testator's Goods, and the Damages of the Executor's Goods in default of the Testator's. What if the Executor Defendant confess that he have *Assets* to the value of part of the Debt, not of the whole? There for so much as is confessed the Plaintiff may pray, and have Judgment presently without Damages, and may maintain for the residue of the Debt, that the Defendant also hath *Assets* for the rest, and so goe to Triall; as appears both by the printed Book of Entries, and another Manuscript which I have. But what if this Triall pass against the Plaintiff? Shall he then have an additional Judgment for Damages in respect of the former? I think he shall have Costs, which commonly run with or in the name of Damages; but without a Writ to enquire of Damages, none being found by Verdicts, the Court doth not usually adjudge Damages. Yet in the Book of *Entries* I find 6s. 8d. Damages assessed by the Court upon a Confession in a Writ of *Rationab. part. bonorum* against Exec. and this hath much affinity with an Action of Debt. Yea, in the very Action of Debt where the Jurors

rors for miscarriage after their departure from the Bar were fined, I find that the Plaintiff renouncing the Assessement of Damgages by them made, and praying the Court to assess the same, it was done accordingly: but this was a special Case.

*M.28.H.6.
Ro.2.321.
Lib. Intyate
329.a.*

Whereas we before shewed that an Executor denying his Executorship shall, if it be found against him, pay the Debt of his own Goods for his false Plea; this thereabout occurreth to be added, *viz.* that that is onely where the immediate Executorship of the Defendant is denied. For if *B* be made Executor by *A*, and *B* dying makes *C* his Executor; now if *C* be sued for the Debt of *A* as Executor of *B* Executor of *A*, and he denieth that *B* was Executor of *A*, which by consequence is a denial of his being now Executor of *A*; yet if this fall out in Triall against him, he shall not in his own Goods stand liable to this Debt, because it is possible that he might not know to whom his Testator was Executor. So if *A* made *B*, *C* and *D* his Executors, and *E* is sued as Executor of *D*, the surviving Executor of *A*, if *E* deny that *D* his Testator survived *B* and *C*, by consequence whereof he denieth the truth, *viz.* that the Executorship of *A* is de-

*See lib. Inty,
322.*

devolved to him, yet shall not this, found against him, charge his own Goods; for he might be ignorant of this point in fact, *viz.* whether *B*, *C*, or *D*, lived the longest. And here he denied not his own immediate Executorship, but a mediate or more remote Executorship. And so, I think, is the Law, where *C* being sued as Executor of *B*, Executor of *A*, he pleads that *A* by a latter Testament made himself Executor, which is found against him; so as here he falsely pleaded, and pretended himself to be the immediate Executor of *A*, and so denied the mediate Executorship, *viz.* of *B* to *A*, and of him to *B*. Yet *Quære* of this: for why should not as well his false making himself an Executor immediate to the indebted Testator charge his own Goods, as well as his false denying of that Executorship; since both Pleas tend to the overthrow of the Plaintiff's Action, and each equally rested in the Defendant's knowledge? But this difference is between them apparent, *viz.* That the denial of Executorship, if true, is an utter and perpetual Bar to the Plaintiff, as against him so pleading; but the affirming of an immediate Executorship, where he was sued

sued as Executor mediate, doth not so, if true, but directs the Plaintiff to a better Writ or Action, *viz.* against him as immediate Executor to the indebted Testator.

Whereas we have before touched upon the coming of *Assets* futurely to Executors, I think it is not amiss to consider a little the form and frame usual in Pleas of Fully administred, which thus run, *viz.*

Quòd die impetr. &c. plenè administravit Lib. Int. 151.
omnia bona & catalla quæ fuerunt præd.
S. temp. mortis suæ, & nihil hab. de bonis,
&c. quæ fuer. præd. S. temp. mortis, &c.

Thus tying his denial upon the things which were the Testator's at the time of his death, what if then the Executor have at the time of this Plea pleaded Goods which were not the Testator's at his death, but since accrued, as before is shewed; or perhaps a Lease for years sold by the Testator, upon condition to be void, if five hundred pounds not paid at such a day, which happening after the Testator's death, and Default made, the Term returneth; or, if the Executor by a Writ of Error reverse a Judgment given against his Testator for two hundred

7 H. 4. 39.
 Bro. 50. This
 Plea is not
 good, *per*
Cur. because
 some may
 have since
 accrued,

dred pounds, and so is restored thereunto? may the Plaintiff now reply generally, that he hath *Assets* which were the Testator's at the time of his death? How can the Jury so find, when the truth is not so? Surely this case is not common, nor can I shew a Precedent of a special Plea therein. But in reason methinks it should be specially, and not generally, pleaded and set forth in the Replication. And in case where one sued as Executor denieth that he was ever Executor or administered as Executor, I find sometimes the Replication general, that he did administer, without shewing wherein or how; and sometimes special, shewing what thing was administered, and where. Here note, that the Executor Defendant denying (as he must) two things, *viz.* 1. that he ever was Executor, 2. that he ever administered as Executor; the Plaintiff in his Replication is tied to maintain but the one of them, as the truth of the case is: that is, if in truth the Defendant were made Executor, but never did administer, now it must be replied that he was made Executor at such a place, without speaking any thing of his Administring: on the other side, if he did ad-

Lib. intrat.
322.a.b. but
 a place must
 be shewed.
So 11 H.6.
19,20. Br.
 62.

administer, but was not made Executor, then onely the Administring is to be replied. But if it shall be found that the Defendant had Administration to him committed; and so administred by virtue thereof, then is the Verdict to passe for the Defendant, for this is no Administring as Executor; and upon a general denial thereof this may be given in Evidence, as the Lord Dyer reports to have been resolved. But if the Plaintiff do in his Replication maintain both the Points, shall this make his Plea double? Methinks it should; yet I find it so replied, and no exception taken for the Doubleness, *Tr. 17 H. 8. Rot. 28.*

A Sole woman being Executor maketh a Deed of gift of the Testator's Goods in trust, but continueth possession of them, and marrieth *J. S.* who also hath possession of the Goods, and in an Action of Debt by a Creditor Fully administred is pleaded: now upon Evidence the Verdict shall pass for the Plaintiff; for this Alienation, being fraudulent, was void as to all Creditors, and so as to the Plaintiff the Goods continued the Testator's, and so *Assets* in the Defendant's hands, as was held in the *King's Bench*. If Fully administred be

T pleaded

So done *Co.*
Li. intr.
104. b.

Mick. 13 &
14 El. Dy.
30.

Lib. intr.
312. b.
Tr. 37 Eliz.

Yet *Finch*
 46 E. 3. f. 9,
 10. held the
 contrary,
viz. that
 Judgment
 should be of
 the whole,
 but Executi-
 on onely for
 so much, and
 a *Scire fac.*
 for the rest
 when more
Assets.

See *Coke*
 1.8. fol. 134.

pleaded where the Defendant hath *Assets* for part, but not sufficient for all, and so it is found; yet shall not Judgment be given for the whole, but for part presently, with a farther Award, that when more shall come to the Executor's hand, the Plaintiff shall then have farther Judgment for the rest: so as that false Plea doth him no prejudice, but makes him in as good state (the charges of Trial excepted) as if he had confessed himself to have part. And I think the Plaintiff upon that confession of part may pray the like Judgement, without maintaining that the Defendant hath sufficient for the rest; for if that be not true, why should he be put to the charge of a Trial by Jury? Yea, Sir *Edw. Coke* at the Bar *Tr. 36 Eliz.* said, that where Fully administred is pleaded, the Plaintiff is not tied to maintain the contrary, but may presently pray and have Judgment to recover it when *Assets* shall futurely come to the Defendant's hands: which was denied by some. But truly methinks the Law should be as he said, as well as in the former case, where for the part which the Defendant had not *Assets* to pay, it so was done, upon Verdict so finding. But there, as I conceive,

ceive; it was not a present Judgment, but an Award that he should have Judgment futurely; so as after when *Assets* come to the Defendant's hands, the Plaintiff must have a *Scire facias* against the Defendant, to shew cause, not why he should not have Execution, but why he should not have Judgment, as I take it: yea, where it is found for the Defendant that he hath fully administred, yet was it held by all the Justices, 33 H.6. 23, 24. and by *Prisor* 34 H. 6. 24. that when *Assets* after come to his hands, the Plaintiff shall have a *Scire facias* to have Satisfaction out of them: but there *Markham*, *Reluerton* and *Fortescue* were of contrary opinion, and so was the whole Court 4 H.6. fo. 4. And it stands with great reason, that where, upon a Verdict fully found against the Plaintiff, Judgment is given *Quod nihil capiat per Breve*, there he cannot have any Writ to execute the Judgment for him, but is put to a new Action of Debt: yet where it is found that the Defendant hath *Assets* for part of the Debt, but not sufficient for the whole, there it is very congruous that the Plaintiff have presently Judgment for part, and after, when more cometh, then by *Scire facias* against the Defendant obtain

So 19 H.6.
f. 37. 8 E. 4.
fol. 25. Sec.
Judgment
so entred
Co. lib. Intra
151. b.

So 7 E. 4. f. 7.

Judgment and Execution for the rest : for here both Verdict and Judgment were for the Plaintiff against the Defendant, whose Plea that he had no Goods was false , and so found by the Jury. And this difference was strongly avowed by Serjeant *Hanham*, *Mich. 33, 34 Eliz.* and after approved by *Fenner Just. 36 Eliz.* none contradicting it : yet a Book was cited, that the Plaintiff recovering so much as was found in the Executor's hands , should be amerced for the residue ; which *Popham* Chief Justice denied to be Law.

This 21 H.
6. 40, 41.

CHAP. XVI.

Where Judgment shall be against the Executor's own Goods, though no Plea of the Defendant nor Vastation do so occasion : and of the several manners of Judgment in several Cases.

HOW by Wasting , called by us commonly a *Devastavit* , an Executor may draw down the Execution upon his own Goods, hath formerly been handled and discoursed of ; as also what kind of

of Pleas do make the Executor's own Goods liable to the Debt, and what not. Now let us see where without Misadminiftring or Mifpleading, yet the nature of the Action fhall lay the whole Debt or thing recovered upon the Executor's own Goods. And this we fhall find in fome few Cafes. 1. Where an Executor is fued for Rent behind after his Teftator's death, upon a Lease for years made to the Teftator, and by him left to his Executor; here it fhall be adjudged and levied upon his own Goods; for that fo much of the Profits as the Rent amounted to fhall be accounted as his own Goods, and not his Teftator's; therefore is he to be fued as well in the *Debet* as in the *Detinet*, where in other cafes he is not, but in the *Detinet* onely, being fued as Executor. So if any thing delivered to or detained by his Teftator come to his hands, and he ftill detains the fame after the demand, and be thereupon fued in an Action of Detinue; for this is his own act. Nor in this cafe need he to be named as Executor, for he fhall not answer Damages for his Teftator's detaining. So if he affume to pay of his Teftator's having *Assets*, and be fued upon this *Assumpfit*, the which Debt is to be recovered in Damma-

3 Marie,
fol. 112.

Read and
Norwood's
Case.
Co. lib. Inr.
fol. 1, 2.

ges, and that upon or out of the Executor's own Goods; yet is this Action, and the Assumption, which is the ground thereof, founded in the Executorship, and his having *Assets*; for if either he had not been Executor, or if he had not *Assets* at the time of the promise, it had been *Nudum pactum*, and would not have bound him, nor given good cause of Suit. Nay, to goe farther, in the case of Assumption by the Testator, and Suit against the Executor thereupon, we find the Judgment in Mr. *Plowden's* Commentary given against the Executor generally, as if he had not been an Executor, not fixing it upon the Testator's Goods; yet there the very Debt it self is included in the Damages. But contrarily was it after in the seventh year of the late King, viz. Judgment given, that as well the Damages as the Costs should be levied of the Testator's Goods, if so much in value of them were in the Defendant's hands; and if not, then the Costs onely of the Goods of the Executor. And this surely is the righter and more just way: for there is no reason that upon a Promise, more then upon a Bond, the Law should cast the whole Debt upon the back and state of the Executor. But perhaps the

two Judgments may be reconciled thus : The latter was given upon a Verdict, *Non assumpsit* being the Issue, and there the Jury assessed Damages in certain, *viz.* 253 pounds, with the Costs ; so as here the Judgment was compleat and full, *viz.* to recover the said sum : but in the other case the Judgment was had upon a Demurrer, so as the Damages not being known, it was generally that the Plaintiff should recover his Damages against the Defendant. *Sed quia nescitur quæ damna, &c.* Because it appeareth not to the Court what the Damages were, therefore a Writ was awarded to enquire of Damages, upon the Return whereof executed, the Judgment was fully and compleatly to be given of a summe in certain : which second Judgment it appears not by the Book in what manner it was entred, and therefore might perhaps be then agreeable with the other. And that the said first Judgment before Damages enquired of is not a plenary and full Judgment, but an Award of Judgment, hath been divers times resolved ; and that therefore any defect and insufficiency in the Declaration may be shewed time enough after the first, and before the second Judgment. Yea,

*Tr. 30 Eliz.
Pasch. 33 E.
in com.
hauc.*

if the Plaintiff die before the second Judgment, though after the first, the Action falleth to the ground : so if the Defendant die ; otherwise of death after full Judgment. But this notwithstanding, and howsoever there were done upon the second Judgment, methinks it were righter and fitter that the first Judgment should express that the Damages should be had and levied out of the Testator's Goods, for whom and in whose right the Executor is sued,

So for Rent
behind since
the Testa-
tor's death.
Co. l. 5. fo. 31.
The Suit is
in the Debt
as for his
own Debt,
M. 14. &c.
15 E.

Lib. intra.
329. a & b.
De terris &
catallis, &c.

Another Case there is wherein the Judgment must be, as it seems, against the Executor's own Goods, *viz.* in an Action of Covenant for a breach of Covenant since the Testator's death : for so was it held both by all the Judges of *Common Pleas*, except the Lord *Dyer*, and by the Prothonotaries in the late Queen's time ; where the Case was of an House upon the Lea negligently burned in the Executor's time, for which Damages onely were to be recovered. And sometimes where the Executor himself is so to bear the burthen, I find the Judgment entred, that the sum recovered shall be levied of the Lands and Goods of the Executor.

CHAP. XVII.

Of Women-covert Executors.

There being two kind of persons who have some disability upon them, *viz.* Feme-coverts or married women, and Infants, touching whom we find in many places question and disceptation in our Books, we will consider of them by themselves, or apart from others; yet not joyning them together neither, but each by himself separately.

First, therefore, of Feme-coverts; touching whom we will consider these three things.

First, whether they may make Wills and Executors with or without their Husbands assent; and how, whereof, and in what cases.

Secondly, whether they may be made Executors without their Husband's assent, or how their Husbands may hinder it.

Thirdly, what acts in execution of the Executorship they may doe without their Huf-

Husbands, or their Husbands without them.

Sect. 1. A Woman married, or Feme-covert, we know is *sub potestate viri, cui in vita contradicere non potest*, as saith the Writ given by the Law to the Wife for recovery of her Land after her Husband's death, being aliened by him. Therefore it is that Judges, when a Woman is to acknowledge a Fine of any Land, do examine her apart from her Husband, to know whether she be willing, or come to doe it by the compulsion of her Husband: It is therefore hard for her to have freedom of will, and consequently freedom to make a Will. Besides, all her Moveables or Goods personal, which she had at the time of her Marriage, otherwise then as Executrix or Administratrix, are by the Law totally devested out of her, and settled in the Husband as fully *ipso facto* upon the very Marriage, as any other that were his own before. Of these therefore she can make no disposition, no more then of other her Husband's Goods. But in case she do by Will bequeath them, although the Will and Gift be void, yet if the Husband, as the case was in the time of *Edward the second*,

Sola & secreta examinata.

Debts except, which are not properly goods.

§ E.2 Fitz.
Devise 24.

cond, do after his Wife's death consent to this her Will and Gift, by delivering of the Goods bequeathed after her death, or assenting that the Legatee take them by virtue of such Will and Gift; this amounteth to a new Gift by the Husband. If a Woman have a Lease, an Estate by Extent, a Wardship, the next Avoidance of a Church, or other Chattel real; these are not devested out of her into her Husband by Marriage, but in case she overlive him, they continue to her as before, no Alienation or Alteration having been made by the Husband, who had power to dispose of them by Gift in his life-time, though not by his Will: yet such a Woman in her Husband's life-time could not of or for these things, without her Husband's assent, make an Executor or Will; but she dying before him, they would, by the operation of Law, accrue to him. And here then observe a Case, though not frequent, yet full of mischief when it happens: Suppose that a Woman indebted a thousand pounds, and having Leases and moveable Goods to the value of three thousand or four thousand pounds, marrieth with *J S*, and then dieth before the Debt be recovered against

During her
life he is, but
not after.

But the Hus-
band may
receive them
or release
them.

12 H. 7. f. 22.
The Hus-
band was
sued in Spi-
ritual Court
as Executor
to his Wife.
So she is of-
ten to for-
mer Hus-
band and to
Father, &c.

gainst her; in this case the Husband shall have and go away with all this value of his Wife, and is not in Law liable to pay one peny of her Debts, because he is neither her Executor nor Administrator. What the *Chancery* could doe, or rather what the Lord Chancellor or Lord Keeper would doe, in this case, I will not take upon me to say or determine. Another sort or kind of Goods, or rather Interests, a Woman may have, viz. Debts or things in Action, which, as the former, are not devested out of her by Marriage into her Husband, nor yet can she thereof make an Executor without her Husband's assent, although they be one degree farther from the Husband then the said Chattels reals; for that though the Husband do over-live the Wife, he shall not be intitled to them as to the former. But if his Wife make him Executor, as she may, or if after her death he take Administration of her Goods; then, as he is thereby intitled to them, so is he liable also to pay her Debts out of the same, when he shall have received them.

Lastly, *Dato* that a Woman-covert is Executrix to some other person, and in that right hath Goods moveable; these are

are not devested out of her, because she hath them not meerly to her own use, but as representing the person of another: But whether then may she without her Husband's licence or assent, in respect of her being an Executor, and for continuation of this Executorship, make Executors, and consequently a Will, or not? Hereabout hath been much diversity of opinion. Some Books generally speak, that the Wife may make an Executor, but speak nothing of the Husband's assent; whether necessary or not. Elsewhere we find it mentioned, that if the Husband after the Wife's death countermand (some Books, false printed, say command) the proving of his Wife's Will, then it loseth all force, or becometh void and of no value: but in this case is no mention in what state this Wife stood, *viz.* whether she were Executor or not, no not so much as whether she had any thing in Action, or Chattel real or not, so as nothing in particularity can be grounded upon that Case. But there are expresse opinions, that the Husband's assent is absolutely necessary even in this case, so as without it the Wife's making an Executor shall be meerly void, and, consequently,

39 H.6.f.37.

34 H.8.f.8.
Bro. Testa-
ments 21.18 E.4.f.11.
Vavafor
Just.

quently, he to whom she was Executor shall now by her death be dead Intestate. And of this opinion was *Babington*, chief Justice, in the beginning of *Henry* the sixth his time. Yet contrary hereunto was the opinion of *Finew* chief Justice in the time of King *Henry* the seventh, viz. that where the Wife is an Executor, she may also make a Will and an Executor without any consent or assent of her Husband. And to this opinion doth Master *Perkins*, after consideration of the Books on both sides, incline. But some will say, that since all this, in the late Queen's time this hath been contrarily resolved, viz. in the case between *Andrew Ognell* Plaintiff, and *Underhill* and *Appleby* Defendants; in the end of which Case it is in expresse terms said to have been then resolved, that a Feme-covert or Married Woman could not make an Executor without the consent of her Husband. To this I answer, that this Case is to be construed with relation *ad materiam subjectam*, viz. to the matter and point in question and under consideration, which was that state of a Woman whereof we have before spoken, viz. one having things in Action, Debts

4 H. 6. f. 31.

12 H. 7. 24. b.

Tit. Devif. f. 27.

Mil. 29 Eli. in com. ba.

Coke lib. 4. 51. b.

Debts or Duties to her belonging, as there in particular it was Arrerages of Rent due to the Woman before Marriage. As for the point of a Woman Executor to another person, it was never in that Case under disceptation, no nor once mentioned in the Debate or Arguments thereupon. Now considering the very form and phrase of Judgments at the Common Law, which are thus, *viz. Ideo consideratum est per Curiam, &c.* not, *Adjudicatum est*, that is, It is considered by the Court, not in expresse terms, that It is adjudged; this, I say, well observed, (as to me it seems very remarkable) gives us to know, that no more is adjudged then is considered of, the Judgment being contained and clasped up in the word *Consideratum est*. Wherefore since in Ognell's Case the point of a Woman-covert's ability, in case where she is an Executor, to make a Will and Executor, hath not been considered of, (the eyes, tongues, nor thoughts of the Judges being once set upon it;) it cannot be that that Point is there resolved or adjudged. Besides, even in a few words expressing, as to me it seems, the reason of that resolution, it appears
not

not to have been the Intent of the Judges, that the same should reach or extend to this Case of a Woman-covert Executor : for it is added, (as the reason of the Judgment, in my conceiving) that the Administration of the Wife's Goods doth of right belong to the Husband ; which amounts to this, in my understanding, *viz.* that where the Wife's making of a Will, and consequently of an Executor, may be prejudicial to her Husband, and prevent him of some benefit or advantage, or tend to his losse and disadvantage, there it shall not be available or effectual without his assent; and therefore not in the Case of her who, having Debts or Duties to her due, would, by making another to be her Executor, exclude or preclude her Husband from that benefit which to him should pertain as Administrator of her Goods. Now as for the Goods, Debts or Credit to her as Executor to some other pertaining, no benefit could redound to the Husband by having such Administration of his Wife's Goods, for those should goe and be to the next of kin of the Wife's Testator, taking Administration *de bonis non administratis* of him, if she have no

Execu-

Executor, and therefore her making Executor as touching these brings no hurt or prejudice to her Husband, and so is out of the reason of *Ognell's Case*. Since then it is so, and since the Law favoureth Wills, and it was by implication part of his Will who made her Executor, that she should have power to continue his Executorship, by making another to succeed therein after her decease, for performance of his Will; why should the Law give to the Husband, who can receive no prejudice thereby, power to give impediment thereunto? for, *Frustra est inutilis potentia*; even Reason it self frames and awards against him in this Case a *Quare impedit*, or rather a *Non impedit*, as to me it seems. Wherefore to conclude, I take it that the opinion of *Finneux* is good Law in that Point of a Femecovert Executor, though not in the other Point, where she onely hath Debts or things in Action to her self due: for therein the said Resolution in *Ognell's Case*, grounded upon good Reason, gives me satisfaction to differ from *Fin.* who, making no difference between the Cases, held the Husband's assent needless in both. *Posito* then that the Wife of *J S*, having Debts due to her self,

and being also Executrix to *J D*, makes without her Husband's assent *J N* her Executor, and dieth; what shall we now say? shall we say, that as touching the Goods and Credits or things in Action to her as Executrix of *J D* pertaining, this Will stands good, and *J N*, as her Executor, may prove it, contrary to her Husband's will? and that as to the Credits to her self in her own right pertaining the Will is void, and thereof her Husband may take Administration? Shall she die both testate and intestate, with a Will and without a Will? shall she have both an Executor and Administrator? Why not, to several purposes, as well as where an Executor is made onely for one particular thing or one place, the Testator may elsewhere die intestate? And so where the Executorship is divided, as before is shewed, and one to whom part is committed will prove the Will, but the other to whom other part of the Executorship is committed will not take it upon him; here must needs be a dying for part testate, and for part intestate.

As for the second Point, *viz.* Wives or Women-coverts being made Executors, and so having the Office of Executorship put

put upon them against their Husbands will, there hath also been diversity of opinions: In the time of King *Edw. 1.* *Brab.* Justice saith, she may be Executor without her Husband, and the Administration shall be delivered to her onely. And I think he meant that this might be without the consent of her Husband, or whether he would or not; for so it is said in the time of King *Henry* the seventh to be the Law Spiritual; and indeed in Courts Spiritual no difference is made between Women married and unmarried, for ought I can find. There a Wife sueth, and is sued, alone without her Husband; he intermeddleth not, nor is intermeddled withall, touching the things pertaining to his Wife. But at the Common Law it is otherwise; and there, as *Brian* chief Justice saith, a Wife without the assent of her Husband cannot be Executor, he meaning thereby that the Husband may oppose and hinder it; for such a one may be named Executor in and by a Will, without the knowledge of her Husband. Let us then see how after the death of the Testator the Husband can hinder her proving the Will, or intermeddling to Administer, since it may be a matter both of much

*13 Ed. 1.
Fitz. Exec,
119.*

2 H. 7. 15. b.

2 H. 7. 19,

trouble and danger to him to have the Executorship fasten upon his Wife, and consequently upon himself. On the other side, it may be a benefit and advantage to the Husband; and therefore we will also consider, whether the Husband may (though his Wife would refuse) assume the Executorship, and fasten it upon her. The Testator therefore being dead, and fame or common bruit carrying it to the Ordinary, that the Wife of *J S* is made Executrix; if she come not in *gratis* or voluntarily to prove the Will, Process or a Citation is to be sent out of the Spiritual Court against her, to enforce her coming in to take on her the Executorship. She coming may clearly, as well as any other person, (especially if her Husband concur with her therein) refuse this office, trust and charge, so as if there be no other Executor named, the Ordinary must commit the Administration. If she should not come and appear, she should be Excommunicate, as I take it, notwithstanding any allegation or intimation by her Husband of his unwillingness to have her take upon her the Executorship. But suppose she doth come into Court, and offers her self ready to take the Executorship

ship upon her ; and on the other side her Husband expresseth his dis-assent thereunto, praying that she may not have the execution of the Will to her committed : what will then be done ? This, I confess, pertains to another Learning, and not to that of our Profession. But forasmuch as I find, that in the Courts Spiritual a Wife stands in the same plight and state as a Woman sole, the Husband not intermeddled withall in the affairs of the Wife ; therefore do I conceive, that in that Court the Husband's refusall will not be of force to hinder the committing of the Executorship to the Wife not refusing ; at least if there come not a Prohibition to stay the Spiritual Court's such proceeding. But whether a Prohibition be in such a case to be granted or not, as I find no resolution in my Books, so will I not take upon me to resolve. This stands clear in the Rules of the Law of *England*, that the Wife is under the Husband's power, & cannot contradict him in pleading and doing other acts, even touching her own Freehold: nay, she cannot take Lands nor Goods by Gift or Conveyance without her Husband's assent, as the Law hath been, and, for ought I know, is taken. But if once the

33 H. 6. 31.

43. 39 Ed.

3. 1.

27 H. 8. 24.

Will be proved, and the execution thereof committed to the Wife, though against her Husband's mind and consent, I think it will stand firm; and the Husband and Wife being after sued, cannot say that she was never Executrix. And I doubt whether the Wife administering without the Husband's privity and assent, although the Will be not proved, do not conclude her Husband as well as her self from saying after in any Suit against them, that she neither was Executor, nor did ever administer as Executor. Yet perhaps this Administration by the Wife against her Husband's mind will (as against him) be as a void act; else cannot I see how *Brian's* opinion before cited, *viz.* that the Wife shall not be an Executor without or against her Husband's mind, can be Law. On the other side, if the Husband of a Woman, named Executor, would have his Wife to take upon her the execution of the Will, and to prove the same, but she will not assent thereunto, (wishing, perhaps, that gain and benefit rather to some of her kindred by a way of Administration, then to her own Husband by her Executorship, as sometimes Wives accord not well with their Husbands;) in this case I think

11 H.6.4.
The Plea is,
that the
Feme did or
did not ad-
minister,
without
speaking of
the Hus-
band,

23 H.6.31.
The Hus-
band may
administer,
and prove
the Will for
his Wife,

think the Court Spiritual will not fasten the Executorship upon the Wife against her will. But *dato* that the Husband, though the Will be not proved, doth Administer as in the Wife's right, but against her mind and will; shall she be now hereby bound and concluded, so as after she cannot decline or avoid the Executorship? And surely I think, that during her Husband's life she stands concluded at the Common Law, for that there she shall not be nor can be sued alone as Exec. and then being sued with him, she must joyn in Plea with him, *viz.* that she neither was Executor nor administered as Executor; and then this act of her Husband's given in evidence will, as I take it, cause that the Verdict be found against her: not so after her Husband's death; then she may refuse, as the L. *Dyer* saith, and citeth as resolved. These things I thought good to offer to consideration, and so leave them without resolution. Difference perhaps may be where a Woman so made Executor taketh a Husband after the Testator's death, before either proving or refusing to prove the Will, and where she is made Executor during the Coverture; as there in case of a discent of her Land to the Heir of a Disseisor; for

1 *Eliz. Dyer*
166. b. there
is cited
3 *H. rot. 112.*
Nota per
Bill.

when there is upon her such a state of Election, she, marrying before her Resolution or determination, doth upon the matter deliver it into the Husband's hands: nor so where it first findeth and falleth upon her in the state of Coverture. If the Husband were indebted to the Testator, this making of the Wife Executor is, as I take it, a Release in Law, as well as if she were the Debtor; but if after the Testator's death she do marry such a Debtor, it is a Devastation.

The third Point.

Touching the Administration or Execution of the Office of an Executor by a Feme-covert and her Husband.

WE will now come to admit the Execution of the Will assumed by concurrent consent of Husband and Wife, and the Will proved with both their likings in the Wife's name; and examine what acts the Wife of her self is able to doe, and what her Husband without her.

It hath been conceived by many of old, and by some of late, that if a Feme-covert or married Woman Executrix release a Debt

Debt of her Testator, or give away the Goods which she hath as Executor, or deliver a Legacy bequeathed, it was firm and good ; and on the other side, that her Husband's Gift or Release was of no value, for that the Administration or Execution of the Will is committed to the Wife onely. And some have gone so far as to say, that she may sue or be sued without her Husband, (in the Courts of Common Law, I mean; for in the Spiritual Court it is true, the Husband is not joyned with the Wife in Suit.) But the Law is doubtless in all those Points contrary, as not onely some opinion also was of old, *viz.* in the time of *H. 7.* but also hath been in the late Queen's time resolved : for otherwise, if the Wife's Gift or Release should stand good, her act might exceedingly endamage her Husband, and make his Goods liable to the Creditors, the Testator's state being wasted by the Gifts or Releases of his Wife. Wherefore it was held in the said late Case, that unless due payment were made to such Women-covert Executors, their Releases or Acquittances be void, and so also their Gifts and Grants: yea, it was then held, that the Husband of the Wife Executrix may give goods, or make Releases of Debt, at his pleasure.

See 18 H. 6.
4. In Debt
the Plea
shall be, that
she hath fully
admini-
stred ; and
Reply, that
she hath *Assets*, never
mentioning
the Husband.

33 H. 6. 31.

23 H.6.31.

pleasure. But doubtless by Marriage neither are the Goods (though personal) which the Wife hath as Executor devested out of her, and settled in her Husband, as her own Goods are; nor, if she die, shall they accrue to the Husband, if no alteration were of the Property, but shall go to her Executor, or to the next of kin, being Administrator of her Testator, if she have no Executor: and so was it held in the first year of *Queen Mary*. Yea, though for any other Goods which the Wife had in her own right before marrying, the Husband alone, without naming the Wife, may maintain an Action of Trespass: yet touching such Goods as the Wife hath as Executor, the Action must be brought in the names of the Husband and Wife, to the end that the Damages thereby recovered may accrue to her as Executor in lieu of the Goods. So also must the Replevin for those Goods be in both their names. But although the Husband be thus named with the Wife, yet principally is it the Suit of the Wife; and therefore in such Actions, or in Debt by Husband and Wife, she being Executor, if it come to Triall by Jury, the Husband being an Alien, yet shall he not have

M. 31 El. in com. ba. If the Husband be to avow, it must be in the right of his Wife, Executor, or Administrator. Mansfield's Case. Doctor Ju-lier his Case.

have Triall *per medietatem lingua*, or *alienigenarum*, that is, by half Aliens, as in other cases where an Alien is party to a Suit is to be had. And where to a Wife made Executor power is given to sell Land of the Testator's, she may sell to her own Husband, as was resolved in the time of K. Henry the seventh, where the Feoffees (it being Land settled in use) were committed to the Fleet, for that they would not execute an Estate to the Husband according to the Wife's State. But of this I much marvel, since the Law intends the Wife so under the Husband's command and subjection, that it holds not her disposition of Land to him by Will free, nor therefore of force; and how shall this then be conceived to be but a partial Sale? Yet *volenti non fit injuria*, and he that will put such power into the hands of a Woman under Coverture, doth in a manner subject it voluntarily to the Husband's will. And it hath been held by some, that even an Infant's or Feme-covert's Conveyance in such case of necessity should stand firm and unavoidable, because of the Condition express or implied, that the State should be void if no such Conveyance made.

10 H. 7. 20.

Bro. Just.
Cui in vita
15. She may
sell to any
other, but
not to him.

Fenner Just.
in ba. reg.
Fasc. 37 El.
& 34 E. 3.
Bro. *cui in*
vita 15. No
prejudice to
them, that it
be good.

CHAP. XVIII.

Touching Infants, and their making or being made Executors.

BEing now to consider of disability by Age, for want of years in persons making or being made Executors ; let us first take view of the several Ages of men and women, to several purposes material in the Law, Judgment, and Respect. And first, touching a Woman :

35 H.6.41.b. *Wangford* in *Henry* the sixth his time shews, and other Books approve, that she hath six several Ages respected in and by the Law. As first, the Age of 7 years, for her Father to have Aid of his Tenants to marry her. Next, nine years, to deserve Dower, that is, that in case she be of that Age at the time of her Husband's death, she shall be endowed : but not if she be any thing under those years ; the Law being Physically informed, that a Woman at those years may conceive a child, but not under them. But of somewhat different opinion was, as it seems, the Parliament in the late Queen's time, when it was made Felony to have unlawfull carnal knowledge of any Woman-child under the age

age of ten years, it being then conceived, as I think, that no such could consent. The Age of 12 years is a Woman's time for assenting or disassenting to Marriage in more tender years had. For so it appears by divers Books; although Mr. *Littleton* have here no distinction between male and female. The age of 14 years is a Woman's time to be in Wardship, or not; so as if she be any thing above those years at the time of her Ancestor's death, she escapeth Wardship. The Age of sixteen years is her time of coming out of Wardship, being once fallen under it: for although had she been full fourteen, she had escaped it; yet not so being at the time of her Ancestor's death, her Wardship lasteth till sixteen years, except the Lord shall sooner marry her. And lastly, the full Age of a Woman, whereby she is inabled firmly and unavoidably to make Grants or Conveyances, is 21 years, as well as for the Male; before which time, be it that she being sole make a Feoffment or other Conveyance, or being married alien her Land by Fine, and her Husband of full age joyn with her, yet is it infirm and avoidable.

Now of the Male, or Man, the first Age material, and settledly resolved on,

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5.

6.

1.

is

is twelve years ; for at that time each Male is at the Leet, to swear his Fidelity to the King. This Women doe not, and therefore are they never said to be outlawed, but to be waved, because they have not this admittance into the Law which Males have. This hath been, as I think, the ground of that speech, that *Women are lawless Creatures.*

2.

The second Age of Males is 14 years, accounted by the Law the Age of Discretion especially material to two purposes ; viz. First, that if one under that Age commit an act amounting to Felony, yet is he to stand free from the Attainder and Punishment incident to a Felon. Regularly it is thus, but, *Non est regula quin fall.* One of much less years, having attained ripeness of Discretion and discerning, shall incur the like Attainder as one of full age : as was resolved in the time of King Henry the seventh, touching an Infant but of the age of nine years, who having killed another Boy of the like Age with his knife, and then hiding the slain Boy, and excusing the blood found upon him by saying that his nose had bled ; it was held by the Judges, that he was to be hanged as a Felon,

3 H.7.f.1.6.

Felon, his such Non-age notwithstanding. The other point, touching which this Age of fourteen years is especially material, is touching an Heir of Lands held by Socage: for in case such Heir be under that Age, he is to be in Ward to the next kin; but if he be of that Age, he is not to be in Ward at all, for that the Law judgeth him to be of Discretion at those years: and therefore a Gardian in Socage being in effect but a Bailiff accountable, he hath no need of such an one, other then such as himself shall chuse.

The third Age in and touching Males material is fifteen years: for every Lord of a Mannor, or one having Free-holders in Socage or by Knight's Service, when his eldest Son cometh to that age, viz. fifteen years, is to have of them Aid for the making of him a Knight, towards which every one holding by a whole Knight's Fee is to pay twenty shillings, and so ratably for more, more, and less, less; and each holding twenty pound Land in Socage is to pay the like sum, and so ratably for more or less.

3.

The fourth Age of Males is the full age

4.

age of 21 years, which maketh him free from Wardship, having Lands held by Knight's service descended unto him; and also makes him able to alien Lands or Goods, makes firm his Bonds, Statutes, Recognizances, &c. For although at fourteen the Law judge him of Discretion, yet doth it not hold him fully ripe till one and twenty.

5.

Oblitum.
Another of
60. to ex-
empt from
being com-
pelled to
serve by the
Stat. of La-
bourers.
23 E.3.c.1.
W.2. cap.38.
13 E.1. No.
na. Br. 165.

The last Age of Males respected by the Law is seventy years: at which time Sheriffs are to forbear to impanel them in Juries; and in case they do not, such old man may have a Writ to the Sheriff, grounded upon the Statute for that purpose made in the time of K. *Edw. 1.* commanding such Sheriff to forbear the impannelling of him, and he may have an Action to recover Damages upon that Statute. This is called by most a *Writ of Dotage*; a word, perhaps, anciently taken in a good and favourable sense; *pro dote atatis*, viz. a Gift, Priviledge or Exemption allowed to Age in favour thereof, and as a benefit. Having thus by way of ingredient or introduction taken view of these several Ages, let us now see wherein and how Age is material touching them who are to make or to be made

made Executors, and what Age is required thereabout. Master *Perkins* saith, that one of four years old may make a Will, and consequently Executors; and his reason is, because the Executors being to account before the Ordinary, it cannot be intended but that the Goods shall be distributed for the good of his Soul. He speaks as if he onely made an Executor by his Will, but did not bequeath any thing, but left all to the Executor's Conscience and Discretion; which is not usual, though feasible, as before I have shewed, or said at least. But admit it were so, and no Bequest at all contained in the Will; yet since at that Age an Infant hath no Discretion to elect a fit person to distribute his Goods, Money and other things, nor to make continuation of an Executorship to another, to whom perhaps the Infant was Executor; I cannot see that his Will should be of any force: but if he be of the age of 14 years, being the Age of Discretion in the Judgment of Law, then I should hold him able to make a Will, although yet he be an Infant till 21 years, and can make no Gift of Land nor Goods which shall be of force. And *Babington* Chief Justice, to other purpose, makes

Devise f.
97. No good reason, for one may make an ill Account, specially having a Child's discretion for his doings.

9 H.6.f.6.

like distinction between an Infant of such tender years, and one come to the years of Discretion. So also, as before we shewed, is it in the case of Felony. And that way also sounds that which *Hanck* says in 2 H. 4. 22. *Henry* the fourth his time, viz. that an Infant of 18 years old may be a Disseisor; as implying, that his years may be so tender, that, as *Candish* saith of an Infant in 40 Ed. 3. 44. in *Edward* the third his time, he is not to be intended able to know or discern between good and evil: methinks therefore he should be at the least of the age of Discretion, viz. 14 years, who should be able to make a Will, and consequently an Executor. And the Custom for an Infant of fifteen years old to bequeath by Will hath, as to me it seems, affinity with this Opinion, though there the Case was of Land in a Borough devisable by Custom. 37 H. 6. 5. And that way reflecteth the Case in the time of King *Henry* the sixth, where it was said, that an Infant under fifteen years of age should not wage his Law, viz. take an Oath to acquit himself of a Debt, or excuse his Default in an Action real. 11 H. 6. f. 40. 6. And farther reason of this Opinion will arise out of the consideration of an Infant made an Executor.

Now

Now touching an Infant made Executor, how young soever he be, the making of him so is not void; but yet the Execution of the Will, which is the performance of the office of Executor, shall not be committed to him till he come to the age of seventeen years, by the Law Spiritual, and till then (for that he is not able to doe the part of an Executor,) Administration is to be committed to some other: yet if it be a Woman Infant who is so made Executrix, in case she be married to a man of seventeen years old or more, now is it as if she were of that age, and her Husband shall have the Execution of the Will; and if Administration were before committed during the Minority of the Woman, it shall now cease, as is said in *Prince's Case*. Yet I do a little marvel at these Opinions, considering that these things are managed in the Spiritual Court, and by that Law; and it intermeddles not with the Husband in the Wife's Case: now by that Law, and not our Common Law, comes in this limit of 17 years. And I have seen it otherwise reported in and touching the last Point.

Co. lib. 5.
fol. 29. p.

M. 41
42 Eliz.

Farther touching Infants Executors,

X 2

and

Co. 1.5. f. 29.
 But pay-
 ment is to
 be made to
 the Execu-
 tor, and not
 to the Ad-
 ministrator,
M. 15 & 16
El. in com.
b. Rep. 67.
Co. li. 5.
fol. 29.

Co. lib. 6.
fol. 671.

and under the age of seventeen years, this is to be noted, *viz.* that such an one is not able as an Executor to assent to a Legacy, so as it may by virtue thereof settle in the Legatee. Also if Administration be during such Minority committed with special words of Restraint or limitation, *viz.* that it is done to the use or profit of the Infant-Executor, then no Sale of Lease or Goods, or assent to Legacy, by such Administrator, will bind or prejudice the Infant-Executor; but otherwise, perhaps, if the Administration during the Minority be committed generally. And if the Testator himself, making an Infant Executor, doth also appoint another to be his Executor during his Nonage, expressing it to be onely for the benefit and behoof of the Infant-Executor; I doubt whether this temporary Executor stand any whit restrained from what pertains to the power of an absolute Executor: for there may be, perhaps, difference between him to whom the Owner of the Goods commits the government of them, though but for a time and in special manner, and an Administrator so specially made by the Ordinary, another being presently by the will of the Owner or Testator to have

have the Administration, in whom for a time legal defect is found. But now let us pass over this age of seventeen, and consider of the Infant between that time of his being admitted to take upon him the Executorship, and his accomplishment of his full Age of one and twenty. First, then, suppose that he doth release a Debt due to his Testator; whether shall this be good to bind him, and to discharge the Debtor, as well as if the Executor had been of full Age, he now having proved the Will, and being by the Law Spiritual approved an able Executor? And this Point coming in question in *Russel's Case* in the late Queen's time, consideration was had of divers good Reasons for enabling of this Release; as that an Executor represents the person of his Testator, and in his right and power doth these acts, and not in his own, and therefore his Infancy, which is a state or condition of his own natural person, shall no more disable him then it doth the King, a Mayor, or other Head of a Corporation. Also divers Books were found to run that way, as well in the case of an Infant, as of a Feme-covert. But upon great deliberation in the *King's Bench*, and

H. 26 Eliz.

16 H.6.Rc.

45. 21 E.

13. 24.

Co. lib. 5.
fol. 27.

upon conference had with the Lord *Anderson, Manwood*, and other Justices, it was resolved and adjudged, that the Release of an Infant Executor, without payment of the Debt and Duty, would not bind or bar him. 1. For that if it should, it would be a Wasting or devasting of the Goods of his Testator, and so would charge his own Goods. 2. It would be a wrong, which an Infant could not doe by his Release. 3. It was no pursuit nor performance of the office or duty of an Executor, but the contrary. And upon this Judgment a Writ of Error was brought in the *Exchequer-Chamber*, where it was agreed by all, that the Release was not effectual nor binding, so as this Point now had the Resolution of all the Judges of *England*. But it was agreed, that if payment or satisfaction had been made, then the Infant-Executor might have made a good Acquittance and Discharge; and indeed, Payment it self, if proved, brings Discharge enough, except in the case of a single Bill. Note, that the principal Case adjudged was not a Release of any Debt or Duty by Specialty, but of Trespass in conversion of Goods found or taken in the Testator's life-time. But *posito* that this
Infant

Infant had assented to a Legacy, whether
 will this bind him or not? For in the
 Case of *Russel* it is said, that all things
 which an Infant doth according to the
 Office and duty of an Executor will stand
 firm; now it is part of his Office to pay
 and execute Legacies. Yet since this act
 amounts to a Vastation or wasting of the
 Testator's Goods as well as the other, in
 case there remain not Goods sufficient for
 payment of the Debts, and consequently
 here, as well as in the other Case, the In-
 fant's own Goods would become liable to
 his Testator's Debts; I doubt, and in-
 incline, that it is not, nor can stand effectual:
 for except in the other we admit a
 want, or possibility of want, of *Assets* or
 Goods, the Release could neither hurt the
 Infant himself, nor do wrong to any other;
 and that admitted, this case is of like pre-
 judice. Yet if these *Assets* should be void,
 so also would be his payment of Legacies:
 and how then were he an able Executor at
 the age of seventeen years, to sue and to
 be sued for Debts and Legacies? And
 if upon Suit it cannot be shewed that
 Debts will take up all, or disable the pay-
 ment, then, haply, he may be forced to
 pay. *Quare*, notwithstanding, whether

these acts (though voluntary) stand not good upon *Bene esse*, or conditionally, *viz.* if there be besides Goods sufficient, &c. or that else the non-aged Executor may have an Act ion of Accompt for the mony by him paid to the Legatee, and also avoid his Assent, where that is onely needful. But doubtless, neither the Assent of such Executor before his age of 17, nor any payment of a Debt to him, could be good, although such acts to or by another Executor before the proving of the Will would stand firm and good; for this Infant wants not onely proving, but also ability to prove, his Testator's Will; yea, the Will stands suspended, and the Testator as it were intestate, whilst the Administration stands in force, so as during that time nothing can be done by any as Executor: and therefore there is great difference between the Cases. What if payment of a Legacy be made to an Infant, can he make a sufficient Acquittance? This, I confess, is besides the Point in hand; yet because it concerns Infants and Executors, (though not Infant-Executors) it is not amiss here to cast some thoughts and words upon the Point, for that it many times perplexeth both Exec. and Legatees. First, therefore, in case the Infant be of the years

years of Discretion, *viz.* 14, I hold it clear, that any Payment to him made will stand good, for that the Law at that age holds him able to govern and manage his own Lands held in Socage, and consequently to receive the Rents thereof: wherefore, whether he who makes such payment have any Acquittance or not, if he have proof of the payment, he is well enough acquitted from any second payment; and if without payment he get an Acquittance, it will not suffice, the Infancy of him who makes the Acquittance considered. Besides, if the Acquittance be, as most usually they are, but signed onely with the name of the maker, and not sealed, it is onely an evidence or proof of payment, and no pleadable Acquittance, because no Deed; so as it nothing differs from proof by Witnesses, save that it is not mortal, as they. But now if the Infant be under the years of Discretion, what shal we say to a payment to him, specially if he be but 3 or 4 years old, or thereabout? Here I think caution is to be used by the Exec. generally; and the surest way is, if he fear to keep it in any respects, to pay it into the Court where it is recoverable, *viz.* where the Will was proved: yet the Case so may be, as that this pay-

Notes of
Receipts,
called Ac-
quittances,

Quere.

payment may not be at all safe for the Executor. As put the case that he entred into Bond or Statute, to pay all Legacies by such a day to the several Legatees; here, I think, the payment into the Court Spiritual sufficeth not, for that must make the Receipt to be with some Charge, which is in some kind an Abatement: there I think therefore, legally to secure the Executor, the payment must be to or in the presence of the Guardian, because of Noriture, viz. him or her who hath (though not as Guardian in respect of Lands) the Custody or education of the Infant; for otherwise, to pay it into the hands of such a tender Infant, separate from any Governour or Guardian, were to expose it to loss, both for that he is not able to count the sum, and for that he, yet not being come to discerning years, were like, with *Asop's* Cock, to part with Pearls or Coin for Plums and Trifles of no value. But in case no Bond nor other collateral Penalty lie upon the Executor, or in case the Bond or Statute be onely to perform the Will generally, which nothing alters the course of payment which by the Will the Law laies upon Executors; then is not the Executor put to any such payment,
 nor

nor need pay without demand and Acquittance, as in case of payment upon a single Bill, or of Rent-seck, where no Distress can be taken, nor other Penalty incurred. Yet in that case, if Demand be, and Acquittance ready to be given, let the Executor take heed, in case he be bound to performance, that he stand not upon the invalidity of the Acquittance in respect of Nonage; for, as I have said, proof by Witnesses may supply a nullity of Acquittance, and much more the Weakness or Imbecillity: payment according to the Testator's appointment being the matter which acquitteth the payer, and this the Executor may have testified under the hands of divers Witnesses expressing circumstances, so as all dying, he may continue safe from second payment as well as if an Acquittance had, the Witnesses whereunto are subject to mortality as well as the other. But herein Courts of Equity do often interpose helpfully for them who seek not evasion from payment, but onely security in paying. And of Infant-Executors, and, by occasion thereof, of Infancy in Legators or Legatees, thus much.

CHAP. XIX.

Of Legacies.

ALthough these be not recoverable at and by the Common Law, but most naturally at and by the Law Ecclesiastical; yet by Suits in Courts of Equity, as the *Chancery* and *Court of Requests*, they are often obtained, and of many things touching them the Common Law taketh notice, and hath manifold occasions so to doe. We will therefore consider thereabout these parts or Points, some whereof have been in part before touched upon other occasions.

1. Whether any Legacy in certain, and lying in prender, may be taken or had, without the Executor's assent, by the Legatee, or him to whom it is bequeathed.
2. When an Executor can or safely may pay, deliver, or assent to a Legacy.
3. Whether one Executor alone may doe it; and what if the Executor be an Infant, or Woman-covert.
4. What shall amount to an Assent of the
Execu-

Executor, and what to Disassent or Dis-
ablement of assent.

How a Lease or Chattel real may be
given to one for a time, with remainder
to another; how not. 5.

Where an Assent to the first, or one
part of the Bequest, shall imply or amount
to an Assent for the residue. 6.

Of the manner of Assents, and therein
of Assents conditional. 7.

What manner of Interest he in the Re-
mainder of a Lease after the death of an-
other hath during the life of that other;
and whether he may dispose of it during
that time, and how. 8.

Whether this Remainder can be defeat-
ed by any act of the Devisee for life, or by
the death of him in Remainder first. 9.

By what acts or accidents a Legacy
may be forfeited or lost, and therein of
Revocation, death before, &c. 10.

Whether the Executor's Assent shall
have relation to the Testator's death, and
shall make good a Grant before made by
the Legatee. 11.

As for the first, we have before shewed
the Assent of the Executor to be necessa-
ry before any Legacy can be had, for that
Debts are first to be payd, & that the Exec.

If the Exec.
give it to
another, the
Legatee
hath no re-
medy at the
Common -
Law, per
Prifot,
37 H.6.30.

is to look to at his peril. But hereto add a little out of M. *Sainborne*, a learned Civilian, who saith, that in case any Goods be in the hands or custody of *J S*, and the Owner doth bequeath them to him, then may he keep or retain them against the will of the Executor, so as there be other sufficient Goods in the hands of the Executor for payment of all Debts; but though thus (as it seems) it would stand in the Ecclesiastical Law, yet for that no Property is transferred to the Legatee without the Executor's assent, therefore, doubtless, the Executor may at the Common Law recover the thing withheld, or Damages to the value, against the Legatee detaining it. Another Case there is wherein, as the learned Civilian saith, the Legatee may take to him the thing bequeathed lying in preder, *viz.* Horse, other Beast, or piece of Plate, or other like thing known, and in being; and that is, where the Testator doth expressly so appoint by his Will. But herein, doubtless, the Common Law, at and by which Debts are recoverable against Executors, will oppose the Law Spiritual: for else by such appointment the Testator might cause all his Goods to be taken by Legatees, and that
none

none should remain to pay Debts. Yet if there be other Goods besides sufficient for payment of Debts ; then indeed I see not how the Executor can hinder such taking, without violating his Oath taken for performance of the Will. If any say, that it is also a breach of Oath in the other case ; I say, he observeth not that there that clause in the Will, being against the Law, is void, and, consequently, there is a Nullity upon it, and it is as if no such thing were in the Will, and so the Oath extends not to it. And as a Chattel shall not be transferred to a Stranger without the Executor's assent ; so if the Devise be to the Executor himself till he elect to take a Legatee, it shall be to him as Executor, as appears by the strain and Argument of two Cases in *Plowd. Comment.* and more lately in the *King's Bench*, the Point being divers dayes argued, was at last so resolved by three Judges against one. And the reason of *Coke* at the Bar was very good, for here the Executor sustains two persons, viz. an Executor and Legatee, and so all one as where the Bequest is to another ; for, *Quando duo jura concurrant in una persona, aequum est ut si essent in diversis.*

Welchden & Elkington, Paramour & Yardley, Portman & Simmes Case. Trin. 37 El. All but Gawdy so agreed.

As

21 El. Dyer
367.

Cod. 3. f. 29.

As for the second Point, it may have these two parts : First, when the Executor is able to give such assent to a Legacy; and secondly, when he may doe it with safety. As for the first, he is able before Probate of the Will to assent unto the Execution of a Legacy, as elsewhere is shewed, and that although he be not of full age of one and twenty years: but if he be under seventeen years, so as he is not able to take upon him the office of an Executor, and therefore Administration is during that time to be committed to some other; here his Assent is not of force or effectual, as we find, in *Prince's Case*, to have been held in the *Case of Pigot and Gascoin*. As for the second part, till all Debts be payd, the Executor may not safely consent to put the Legatee into the Lease or Chattel devised; no more then he may pay money bequeathed, if there be not sufficient also to pay all Debts. Of these things more is said elsewhere. Yet because the Reader, or he that desires direction in these Points, will look for them under this Title, I thought not good here to be altogether silent touching them.

As for the third Point, viz. Whether the

the Assent of one Executor, where there be many, be sufficient; I see not how to doubt: since any one Executor may give away any Goods of the Testator's, or release any Debts due to him, therefore much more assent; which is no more or greater work, in effect, then an Attornment of one Lessee upon a Grant of a Reversion. And if there want to pay Debts, he onely who assented shall answer for it of his own Goods, and not his Companions. But if this Executor be either under the age of seventeen years, or under Coverture, *viz.* a Woman married, such is not able to give a good Assent to bind the others, no nor themselves, for then thereby the Infant might draw a Debt upon himself, and the Wife upon her Husband, by assenting to or paying of a Legacy, there not being sufficient Goods to pay all Debts. But the Husband's Assent is sufficient where the Wife is Executor; for his act, whom she hath chosen to be her Head, may prejudice as well her as himself; yea, though she were within Age, yet he being of full Age, his Assent will stand good. But if he or another Executor in his own right be above 17 years of age, or else under 21, I doubt whether now

6 H. 7. 5. If the Bequest be to one of the Executors, he may take it without assent of his Companions; yet if a Debt, his Companion may release. H. 48 E. 4. 14, 15. So held where but one of the Executors during Non-age assented, in the Case of Rhetorick and Chappel. H. 9 Jacob. Rot. 87. in *ba. reg. C.*

See Co. Lib.
Int. 150. the
Executor
being Devi-
see for life,
said the o-
ther should
have it after
her death,
and he en-
tered, and
took Admi-
nistration, the
dying inte-
state, yet
held *Assets*
in dlm.
This M. 19
H. 7. Rot.
318. See Li.
int. 321. One
gave the
third part of
his Goods to
A, with
whom the
Executor
accounted
for the A-
mount, and
A sued for
that sum in
Debt; but no
Judgment
upon De-
murrer. Tr.
37 El. in ba.
r. Where
Bequests to
the Execu-
tor himself.

his Assent will be sufficient, at least except the case be put, that there be *Assets* sufficient, which perhaps there may be material, though not in the other. See more hereof after in the Title of Women-covert and Infants Executors,

As to the fourth Point: first, there may be an Assent and Election implied as well as express: for if in the Devise or Bequest the Legatee be appointed to doe some act as in respect of the Legacy, and the Executor doth accept the performance thereof, this amounteth to an Assent. So if the Devise be to an Executor for the Education of some Children, which he doth accordingly educate, this makes an Election to have the thing by way of Legacy, and not as Executor, as appears by the Case of *Paramour and Tardley*, Plowd. 543. So if an Horse be bequeathed, and one offering to buy him of the Executor himself, he directeth him to goe and buy the Horse of the Legatee, or if the Executor himself offer money to the Legatee for the Horse; this implieth an Assent that it should be the Legatee's by the Will: and so was it held in the Case between *Lom and Carter*, where the Devisee of a Term did grant it to the Executor;

entor; and this Acceptance of a Grant from him was held to imply this Executor's Assent, that it should be his to grant. But I see not well how that should be Law which in the latter part of the *L. Dyer* is found, *viz.* Where a Term was devised to *J. S.*, and he was made Executor, and after the death of the Testator entered and occupied the Lands a whole year without proving the Will, that this was an Election to have it as Devisee, and not as Executor. For, first, he had good right to the Term as Executor before Probate, and so might clearly in that right have taken the Profits, although it had not been devised or bequeathed to him, and that before any Will proved. Secondly, he could not by right have it as Legatee, without Assent of himself or some other as Executor. Therefore this general Acceptation can determine no Election, as elsewhere is held. As for Dis-assent or Disablement to assent: As if the Executor do once declare his Assent that the Legatee shall have his Legacy, he may then enter into it or take it, notwithstanding the Executor's Countermand or revocation of his Assent after; so, on the other side, I think, if he fully and expressly deny that the Legacy shall take effect,

Tr. 37 Elm.
If he by Will
bequeath it
to *J. S.*, this is
an Election
to have it as
Legatee.

he cannot after make a good Assent thereunto, for that Election once made must stand peremptory, be it Refusal to assent, or Assent. Yet *Quere* of this, for that the Refusal to assent may be checked by Sentence or Decree in the Spiritual Court or Court of Equity, and so an Assent be inforced. But if the power of Assenting be legally lost by the means aforesaid, *viz.* disabled, I see not how any legal Interest can be transferred by that compelled Assent; howsoever decreed. And what is said of a Legacy bequeathed to another, the same may be understood in case where the Bequest is to the Executor himself, and he makes his Election to have it as Legatee, or as Executor. But if where an Horse is bequeathed to *A*, the Executor after the Testator's death doth ride the Horse, or use him in the Coach or in the Plough, I do not take this to be any such Disagreement to the Execution of the Legacy, as that the Executor cannot after assent to the Legatee's having thereof, no more (though it be somewhat more) then where a Drinking-cup is bequeathed, and the Executor after the Testator's death doth use it to drink in: nay, if a Lease of Land be bequeathed to *A*,
and

So if the
Executor
take a new
Lease, his
Assent after
is void.

Tr. 37 Eliz.
Carter's
Case. 19 El.
Dy. 359.

and the Executor continueth the Depa-
sturing of the Testator's Cattell therein;
yet is not this any Disagreement to the
Execution of the Legacy. But if this Lease-
land were let out by the Testator from year
to year, and the Executor dischargeth
the Tenant, and taketh it into his hands
at the year's end; this I conceive to be a
Dis-assent to the Legacy: and so also per-
haps may his taking or distraining for a-
ny Rent thereupon due after the Testator's
death. Yet am I not resolute that the Dis-
assent is so peremptory and unchangeable
as the Assent, remembring the Case in K. ^{14 H. 8. 23.}
Henry the eighth his time, where a Term
being granted by a Lessee conditionally,
so as the Assent of the Lessor could be had
by such a day; though the Lessor's Assent
were at one time denied, yet might it be
yielded at another, so as it were at any
time before the day. But yet there it was
held, that if no time of Assent were limi-
ted, then one expresse Denial or refusal
would be peremptory, so as the Refusal
were expresse to the party to whom the
Assent was to be given; otherwise, if it
were but in speech to or amongst Stran-
gers, This and the former Case 19 *Eliz.*
give the best light to this Point that on.

Dy. 359. Af-
ter choice
once made,
no variati-
on.

I remember. Now for Disablement to assent, it was held in the forementioned case of *Low and Carter*, that where a Term is bequeathed to *A*, and after the Testator's death the Executor takes a new Lease of the same Land for more years in possession, or to begin presently; now by this was the Term left by the Testator surrendered and drowned, so as it could not pass to *A* by the Executor's Assent after.

As to the fifth Point, *viz.* In what manner a Lease for years or other Chattel real may be bequeathed to one for a time, with Remainder to another; it hath been heretofore much doubted, when a Lease for years was bequeathed to one for life, or for so many years as he should live, whether the limiting of a Remainder thereof after his decease were of any validity in Law or not. And this Doubt had this ground: Any State for life in the judgment of Law is greater than any Term for years: therefore when a Termor hath by his Will given his Term or his House or Land which he so holdeth for years to one for life, or for so many years as he shall live; this Testator and Devisor hath not in the judgment of the

the Law any Estate remaining in him; and therefore it was thought very hard for him to give or limit a Remainder to another. But after many arguings and debates, it was in the late Queen's time resolved, that such a Remainder was good; and that if the first Devisee died before the Term expired, that then he to whom the Remainder was limited might enter and enjoy the residue of the Term. As for the giving of part of the years to one, and the residue to the other; viz. if the Term being twenty years, the Lessee bequeathed ten thereof to his Wife, and the Remainder to his Daughter; of this no doubt ever was but that it was good: for that after the first State limited, there remained a farther Term, viz. ten years more, in the Devisor, whereof he had power to dispose; whereas in the other Case, after the Term limited to one for life, there remained but a possibility that this life should not take up the whole Term. But now, put we the case a third way, viz. that the Termor deviseth or bequeatheth the thing in Lease to one Child in tail, with Remainder to another, and dieth, and the first entreteth and dieth without issue; now

Plow. Com.
520 & 522.

whether shall the next in Remainder or the Executor of him so dying have the Term residue? And this Case came in question and was adjudged about the middle of King *John* his Reign in the *Exchequer*: for there, Master *Hamond* holding by Lease for years from the Crown the Manor of *Akers* in *Kent*, devised the same by his Will to *Alexander Hamond*, his eldest Son, and the Heirs-males of his body, with Remainder to *Ralph Hamond*, another Son, in like manner, and the like Remainder to *Thomas Hamond*, and made the said *Alexander* Executor, who after his Father's decease elected to take as Legatee, and after *Ralph Hamond* died, leaving Issue male, and making his Wife Executrix: *Alexander*, not having Issue male, granted the whole Term by Deed to *B* and *C* for the behoof of himself and his Wife during their lives, and after to the use of his youngest Daughter, whom Sir *Robert Lenkenor* married. Then *Alexander* dying without Issue male, the Wife and Executrix of *Ralph Hamond* entred, claiming the Term, and being kept out, sealed a Lease; whereupon an *Eject. firme* was brought, and a Jury appearing at the Bar in the *Exchequer*, found a special Ver-

Both *Alexander* and *Ralph* were Executors; but that makes no difference.

dict in effect *ut supra*. And in argument of this Case, first the main Question was, whether the Case were all one in Law with the former, where a Term was devised to one for life, with Remainder over, so as by the death of *Alexander Hamond* without Issue male the Term should goe to the next in Remainder, as in the other Case, by the death of the Devisee for life, dying within the Term, it should doe. And on the Plaintiff's part it was urged to be all one, so that by virtue of the Bequests *supra*, *Alexander* had an Estate to him and his Executors onely so long as there should be Heirs-males of his body; and he dying without such Issue, the Term remained to the Executors of *Ralph*, who had the Remainder in like manner, and left Issue male, which still lived, & so that State of *Ralph* yet had continuance. For it was admitted by the Counsel on that side, that the Term could not goe to the Issue male of *Ralph* according to the words and intent of the Will, since it was impossible to make a Term to descend without an Act of Parliament, This therefore they said the Law should work, which was nearest to the intent, *viz.* that after *Alexander's* death it should
goe

goe first to his Executors and Assigns, so long as Issue male of his body doth continue; and for want of such Issue, then to *Ralph*, his Executors and Assigns, so long as his Issue male should last; and therefore in this case, the Issue male of *Alexander* failing, the Executor of *Ralph*, whose Issue male faileth not, should enjoy the Term; and so Judgment ought to be given for the Plaintiff being Lessee of that Executor. On the other side it was said by the Defendant's Counsel, that this Case differeth much from the other Case, where the Term or Land held by Lease is given but for life to the first, with Remainder to another; which Case, as having been often resolved, was clearly admitted to be good Law; for in that Case the intent of the Testator might and did take effect. But in this Case, if the Land should goe to the Executors and Assigns of *Ralph Hamond*, it must goe against the intent of the Testator, whose mind and will was, as it appears by his word, that it should goe onely to the Issue male of one Son after another, and not to any Executors. Now then, since this intent was so contrary to the rules of Law, that it could not take effect, there-

therefore it must be void, and so all the words of Heirs-male standing void, the Will is to be construed as a sole and absolute Gift and Bequest to the said *Alex.* and consequently the Term must goe to his Executors and Assigns. And for this Point, resemblance was made to a Case resolved in the *King's Bench*; where a Lease was made by Indenture to *A, Habend.* to *A, B* and *C* for their lives: now because *B* and *C* could take nothing, it was resolved that *A* should not have it for their lives, but for his own onely. This Case was said to come very close in reason to the Case in question: For as here the intent of the Lease was that *B* and *C* should be estated for their lives, and, since that could not be, therefore the naming of them should be utterly void, and as if they had not at all been named, and their Lives shall not stand as a measure for the Estate of *A*; so in the other Case the intent of the Will being, that the Lease or Land leased should goe to the Heirs-males of the body, first of *Alexander*, and after of *Ralph*, since this cannot be, therefore the words and name of Heirs-males should stand for a mere Blank and Cypher, and not to mea-

Windsmore
and Holford
vel Holbord
M. 28 & 29
Elr. argued,
and Tr. 29
Elr. adjudg.

measure out any State to the said *Alexander* and *Ralph*, and their Executors and Assigns. Also it was said on the Defendant's part, that an Estate for life in the judgment of Law is of so short and uncertain continuance, that if *A* make a Lease to *B* for his life, and after makes a Lease of the same Land to *C* for years, now shall not this latter Lease be void absolutely for any part of the Term, but shall stand in expectance of the death of *B*, and, as soon as he dieth, shall take effect immediately: whereas if the Lease to *B* had been for ten years, or any like Term, then the Lease to *C* should have been void for so many years of his Term. Thus it appears that a State for life is very momentary in the judgment of Law, and not reputed of any certain continuance so much as for a day. But it is otherwise of an Estate-tail, so as if *A*, having given Land to *B* in tail, doth after (without Indenture which makes an Estoppel) make a Lease to *C* for 21 years, and then *B* dieth without Issue during the Term, yet shall not the Lease take effect, because it was utterly void at the first making. For an Estate-tail, being a state of Inheritance, may in the intendment

ment and Judgment of Law have continuance for ever, as appears both by the Case of *Adams* and *Lambert*, where it is held within the Statute of Chanteries, which speaks of Gifts to have continuance for ever. Therefore a Reversion upon an Estate-tail is no *Assets*, nor giveth cause of receipt; otherwise in all these Cases it is touching a Reversion expectant upon a State for life. Again, it was said by the Defendant's Counsel, that an Estate may be limited to *A* and his Heirs during the life of *B*, with Remainder to *C*, as in *Chudley's* Case was resolved: but if Land be given to *A* and his Heirs so long as *B* shall have Heirs of his body or Heirs-males, with Remainder over to *C*, this Remainder is utterly void. So as there is in the judgment of Law a great difference between the largeness and continuance of an Estate-tail and of an Estate for life. And if (which is worth the observing) a Fee-simple cannot afford a Remainder to be drawn out of it after such a Gift to one and his Heirs, during the continuance of an Estate-tail, or of the measure thereof; much lesse can a Term yield such large thongs to be cut out of it, as a Remainder after an Estate

28 H. Dy.
fel. 7.

Estate to one so long as he shall have Heirs of his body, or Heirs-males, which is all one. And in this Case the Remainder was held void by *Baldwin* and *Shelley*, though *Englefield* were of contrary opinion, as the Lord *Dyer* sheweth. Farther it was said, that if such a Conveyance by Will should stand good, it would raise a Perpetuity, not to be cut off by any Recovery.

But whereas the Case of *Hamond* hath been related before, so as by way of admittance it was argued as a Gift and Bequest to *Alexander Hamond* and the Heirs-males of his body, with Remainder in like manner to *Ralph*; the truth of the Case was, that the words of the Will were onely to *Alexander* and his Heirs-males, (not speaking of his body) and so to *Ralph*; which, as was urged by the Defendant's counsel, made the Case stronger against the Plaintiffs: for admit that the former way *Alexander* should have had but a State determinable upon the continuance of his Issue-males, yet here not so; since the reason why in Wills, such a Devise being made, the Law should supply the words (*of his body,*) is onely to make an Estate-tail to the Issues male,

ac-

according to the Testator's Intent. Now in this case of a Term for years so bequeathed, no Estate-tail could possibly be, though these words had been in the Will; and therefore the motive to the Law failing, no such supply will be made by the Law, since it would be to no purpose: consequently, here was neither State-tail, nor Issues or Heirs-males of the body, on whose continuance this State of *Alexander* should be determinable. Therefore it was an absolute and total Bequest of the Term to *Alexander* for ever, viz. so long as the Term should continue; for as a Bequest to one for ever is as much as a Bequest to him and his Heirs; so a Bequest to one and his Heirs is as much as if it had been to him for ever.

And this Case, after six Arguments on each side at the Bar, (if I much mistake not) was upon argument by the Barons adjudged for the Defendant by the Lord chief Baron *Tanfield* and Mr. Baron *Bromley*, Mr. Baron *Denham* (who onely heard, as I take it, one Argument on each side, made of purpose in respect of his coming into his place, after the former Arguments) being of
the

the contrary Opinion : and the Judgment proceeded upon the Point formerly touched, that, as this Case was, the state of *Alexander* did not end by his death, and remain to the Executors of *Ralph*. Other Points were stirred, which will be touched upon in other Divisions after, in this Chapter. It will be observed that I do more fully express reasons and points inforced on the Defendant's part then on the Plaintiff's, wherefore let these two reasons be accepted. First, that I better could relate that then the other, being the first who argued for the Defendant, and hearing little of that which was by others said on either side after, nor hearing the Court's ; *nec ad hoc conductus, nec pedibus fortis*. Secondly, the labour did lie on the Defendant's part, to prove that this Case differed from the common Case of Devise to one for life, with Remainder to another.

We are now come to the sixth Point, *viz.* that where House or Land held by Lease, or the Profits thereof, or the Lease or Term it self, which in a Will makes no difference, is bequeathed to *A* for life, or for some part of the Term, with the Remainder to *B*, and the Executor as-
sents

sents that *A* shall enjoy his Bequest, whether this shall enure to *B* also, since without the Executor's Assent no Legacy can take effect. And it hath been resolved that this Assent shall be effectual as well to all the Remainders as to the first Estate; and so, according to former resolutions, it was admitted in *Hamond's Case*, that *Alexander* his Assent to take as Legatee sufficed (if the Bequest had been good) for the Remainder to *Ralph* and others. And the reason of this doubtless is, because here the particular Estate and the Remainder are all but one Estate in Law; they make but one degree in a Writ of Entry, nor shall have but one year and a day to enter for Mortmain. And an Attornment to the Grantee of a Rent or Reversion for life with Remainder over doth enure also to the Remainder, which being Assent hath much affinity to that of the Executor, each tending to perfect the Grant of another man. Now then, whereas it was urged in *Hamond's Case*, that the State limited to *Ralph* should take effect, not as a Remainder, but as a new Estate to commence futurely, viz. when *Alex.* should be dead without Issue male: if it could be admitted to be so, then could

Plow. 545.
6. Co. lib.
10. f. 47.

not the Assent of the first State to *Alexander* have enured to this, since to *R* in Remainder it worketh as being one State with the first, which reason must fail the other way. This difference between a Remainder and new Estate future brings to my mind the Case of a Rent by way of new Creation, granted by *C* out of Land to *A* for life, or in tail, with Remainder to *B*. In like manner it hath probably been held, although this Limitation to *B* cannot be good by way of Remainder, because *C* had no Estate in the Rent remaining with him when he made the Grant to *A*; yet should it be good by way of a new Grant and Creation to commence futurely. But this doubtless cannot so be but with a difference. For if the Grant were by Indenture between *C* on the one part, and *A* onely on the other part, now *B*, being no party to the Deed, can take nothing by it, except by way of Remainder, but if he were party to the Indenture; or if the Grant were by Decidpoll, to which all men are alike parties, then it haply may enure as a future Grant to *B*. This is not impertinent.

Now as the Executor's Assent to one cannot enure to another, though of the same

same thing, except by way of Remainder; so neither can it any way where the things are not the same, except in very special cases. As if a Testator bequeath a Rent to *A*, and the Land itself to *B*, the Executor's Assent that *A* should have the Rent is no Assent that *B* should have the Land: yet I think the Assent that *B* should have the Land doth imply the Assent that *A* should have the Rent. 1. For that the Restraint imposed by the Law against the passing of Chattell by a Will without the Executor's Assent being out of respect to the payment of the Testator's Debts, now if the Land shall pass to *B*, it is no more available to the Testator's Debts that it pass discharged of the Rent, then charged. 2. Since the Gift and Bequest was of the Land charged with the Rent, therefore if this Bequest shall take effect, it shall carry the Land according to the Testator's intent, *viz.* with this Charge upon it: for what else doth the Executor in this, but assent that the Will of the Testator herein doth stand and take effect? and consequently *B* must take the Term according to the Will, and not in any different or contrary manner.

Plow. Com.
321. in Brex
& Rigden's
Case. So of
Common, or
other profits

Next we are to consider of the manner of Assents by Executors, which hath some affinity with the fourth Point. But here we shall consider onely of Assents conditional. Now to this purpose we will cast our eyes upon two sorts of Conditions, *viz.* precedent, and subsequent. As for the former, an Executor may to a Legatee absolutely give Assent upon a Condition precedent, as thus: I am content, that if you can get and bring in to me such a Bond wherein the Testator stood bound to *£* 5, that then you enter upon the Term, or take the Corn or Cattell to you bequeathed. So of other like Conditions which may precede the Assent: as, If you can get the Assent of my Executor, or, If you will pay the Arrerages of Rent to the Lessor behind at the Testator's death, or, If you will pay the Wages already due to the Servants attending about the Cattell or Corn to you bequeathed. In this case, if the Condition be not performed, there is no Assent, and therefore the conditioning in this manner is good. But if it be on a Condition subsequent, as thus, I do agree that you shall have the thing bequeathed to you, provided that you shall pay so much yearly to me, or to such a Creditor of the Testator;

tor ; now the Legatee entring into or taking the thing bequeathed, shall not lose it again by failing to perform the Condition afterwards ; for the Executor by his Assent cannot make that Legacy conditional which the Testator gave absolutely, no more then he can make the Bequest to be absolute which the Testator gave conditionally, except by a Release made of the Condition. As in other things, so in this, the Executor's Assent is like to the Attornment of a Lessee, which cannot be upon a Condition subsequent, where the Grant is absolute or without condition, though yet he may to his Attornment prefix a Condition precedent.

In the eighth place we are, touching the Bequest of Leases or Chattels real, to consider what manner of Interest one to whom a Remainder of a Term after the death of another is limited hath, and whether he may grant the same or dispose thereof during the life of the first. And as to that it is clear that he hath but a possibility of Remainder, for that possibly the whole Term may be spent in the life of the first, to whom during his or her life it is bequeathed : now a meer possibility is not grantable. Therefore was

9 Eliz. Ful-
sey's Case.

Lampert's
Case. Co.
li. 19. fo. 48.

it resolved in the late Queen's time, where he in Remainder granted or sold his State or Interest to another during the time of the first, that this Grant was utterly void, because a Possibility cannot be granted. But whereas some opinion in that Case was delivered, that this Possibility could not be released, no more then granted; it hath since been resolved, that he in the Remainder, by his deed of Grant or Release of the Devisee for life, may make his Estate, which before was determinable by his death, to be notv absolute, so as it shall continue to his Executors, Administrators and Assigns, after his death during the whole Term. It may be that what was conceived, in the said Case of *Fulsey*, negatively of the validity of a Release by him in the Remainder, might be meant or perhaps expressed of a Release to him in the Reversion; but surely (methinks) though he could not surrender, yet his Release or Defeasance to him in Reversion or Remainder, having the Freehold or Inheritance, should dissolve or destroy this Term residue after the death of the Devisee for life, so as there the Freehold should be discharged thereof. But *Qua-*

re, for I have not known this in question. As for the other Point of *Fulsey's Case*; it was in the said latter Case of *Lampet* confirmed and admitted for good Law, viz. that this Possibility of Remainder could not be aliened nor conveyed to a Stranger.

Now we are come to the ninth Point, viz. to examine whether any act of the Devisee for life can frustrate or defeat him in the Remainder of the Term, and whether the act of God, viz. by the death of him in the Remainder before the first Devisee for life, shall defeat it. As to the first, it hath divers times been resolved, that no Grant made by the first man can cut off or defeat the second, though formerly it were held otherwise: but according to the late Resolution was it also held or admitted by all in the said Case of *Hamond*, where was such a Grant. And as this cannot be done by any direct Grant or Alienation, no more can it by an indirect or implied, as by taking of a new Lease, which is a Surrender in Law of the old Lease, no more then by an expresse Surrender; nor doubtless by Outlawry, whereby the Term of the first Devisee is settled in the Crown. But

Plowd. 220.
Welchden
and Elking-
ton. 10 Eliz.
Dy. 277.
19 Eliz. D.
359. Con. 8
El. D. 253.
33 H. 8.
Br. Chastell
23.

if we put the Case farther, of Wast committed by the Tenant for life, or breach of Condition by not payment of the Rent, or otherwise; these for the whole in the latter Case, and for the part wasted in the former, do so destroy the Lease, and put the Reversion in *statu quo prius*, as that all Remainders must needs fail: so of a Feoffment, or other like Forfeiture by Fine. As for the death of him in Remainder, it was urged in the Case of *Hamond*, that since it was but a meer Possibility, if it could not take effect, and become an Estate in the life of him to whom it was limited, it could not settle in his Executor; and to that purpose were cited the Case of the Rector of *Chedington*, and more expressly as resolved in the Point the Case of *Price and Atmore*. But the Court resolved, (and found former Resolutions in other Courts that way) that the death of him in Remainder did not hinder, but that it may settle as well in the Executors upon the death of the Devisee, as it should have done in himself, if he had over-lived the first Devisee for life. If the Lessor enter and levy a Fine, and the Devisee for life enters not, nor claims in five years; he in the Remainder

Welchden & Elk. ubi supra. But there the Point was never questioned, though such death was there.

der may enter, as having a Right futurely accrued.

In the last place we intermeddled onely with Leases bequeathed, wherein yet is to be understood, that what thereof is spoken is to be extended to and understood of all other Chattels real, as Wardship of Body and Lands, Estates by Extent upon Statutes or Judgments, Terms otherwise then by Lease, in Fairs, Markets, Rents, Annuities, Commons, Advowsons, and other Profits; yea, one single next Avoidance of a Church. Now we come to consider of Bequests personal principally, if not onely; viz. how such may be forfeited, lost, or revoked. First, then, we will consider of the acts of the Legatee; secondly, of the acts of God; thirdly, of the acts of the Testator. The Legatee, as from the Civilians I learn, may forfeit his Legacy by his miscarriage towards the Will: as if he use means to have it concealed and kept from being known, and consequently proved. So if he accuse it of Falsity. So, again, if he deface or destroy the Will. Also, if being by the Will appointed to be Tutor or Educator of a Child, he refuseth so to be. So saith Master Swinborn: but Sylvester Prierius seems

Of Forfeiture, Revocation and other loss of Legacy.

Swinb. de testam. 352, 353. Except as Tutor or Guardian he accuse it.

Sum. Sylv.
283.

seems to me opposite in that where he saith, *Si legatum fuerit aliquid cā conditione ut facias aliquid, tale legatum non est conditionale, sed modale*; so as he takes away the force of a Condition from words conditional, whereas the other without words conditional raiseth a Condition implied. Lastly, if the Legatee presume too far upon the strength of the Bequest to him, so as he taketh the thing bequeathed without the consent of the Executor, thus also doth he forfeit his Legacy, saith Master Swinborn, unless the Testator did will and appoint he should so doe. The falling into enmity with the Testator will be considered of more fitly, as I take it, among the Acts of the Testator. In the next place, let us see what acts of God shall cause a Legacy not to take effect. First thus, If the Legatee die before the Testator, this Legacy is lost, and his Executor shall not have it. So also, saith Master Swinborn, if it be appointed to be paid after the death of the Executor, and the Legatee dieth before the Executor, it is lost. And so also if he die before the Condition performed, saith he. Let us come now to Time of payment, and Death before

De Testam.
292.

De Testam.
295.

before it. If there be a day certain limited for payment, and the Legatee die before that day, his Executor shall have the Legacy; contrariwise, if the payment were limited to be made when the Legatee should be married: but if it were only expressed to be towards the Marriage of the Legatee, and she die before Marriage, her Executor shall have it, saith *Swinborn*. Now put the case that a Legacy is bequeathed to B, to be paid when he shall be five and twenty years old, and B dieth before that age; it shall now be payed to the Executor, and that presently, without staying till B should have been of that age, saith *Pierius*. Nay, saith *Swinborn*, if the words of the Will be so, viz. when he shall come to such an age, then if he die before, his Executors shall not have it at all: but if the Bequest be general, and farther it is added in the Will, that the Testator would have that Legacy paid the Legatee at such an age, there, though he die before such an age, yet his Executors shall have the summe bequeathed. The difference may seem very nice, yet haply it wants not some probable colour of reason. Now lastly let us come

Vide Bro. Devise 27 and 45.
There were divers days of payment, and the Devisee died before the last; his Executor shall have it, 14 vel 24 H. 8. 36 H. 8. 3 El. D. 59. See this difference.

Sum. Sylv. 283. Accord- ing hereto, vide Dy. ubi supra, per majorem opinionem Juris- ficiar.

As of the Testator.

Sum. Sylv.
285.

to the Testator's own act, who clearly hath power to revoke or countermand any Legacy, though he revoke not the rest of the Will. And here first of Revocation presumed. If there fall out *graves inimicitia inter Legantem & Legatarium, Legatum caducum efficitur*, saith the Summist; *sed non propter leves*, saith he: & *si graves, si tamen redeant ad amicitiam, redintegratur Legatum*. That is, by grievous Enmity after arising, and never reconciled between the Testator and Legatee, the Legacy is dissolved; otherwise of a light breach or falling out, though it continue untill the death of the Testator. This I conceive to be rather fit for this place, as an act of the Testator, then to be reckoned or registred amongst the acts or Forfeitures of the Legatee; for that it is not by the Summist made material, or any point of difference, whether the Legatee gave just cause of offence, or that the Testator unjustly conceived displeasure, and so grew into causeless enmity. Therefore also do I hold it of the nature of a Revocation implied or presumed; for that although no Revocation be made, yet since the Testator hath ceased to bear good will to the Legatee, he cannot be intended to will him good,

good, nor consequently to be of the same mind touching the benefiting of him, as he was when he made his Will. Yet here again it is worth the consideration, whether the circumstance following may not make a difference in the case, thus; That where the Testator dieth shortly after the breach and enmity grown, and before he come to the place where his Will is, or at least to opportunity of perusing and reforming the same, there this very alteration of affection should make an alteration in the Will, and a Revocation of the amicable Bequest. But where he living a good space after, and coming to the place where his Will was, and specially if he do again peruse it, he yet doth not cross nor expunge that Bequest, here it may be presumed that either his enmity ceased, or that so far as to continue this Bequest, the Charity or other motives inducing him to make it stood unvanishing and not extinguished by this breach of former Amity. For as the continuance of time and opportunity after the making of a verbal or nuncupative Will, without reducing it to writing, and causing it to be attested by Witnesses, though the Testator live divers years after,

after, doth strongly argue his intent not to continue, that what was done in an extremity should stand as his Will: so, on the contrary, the permitting of a Bequest expressed in a written Will to continue without any crossing, blotting or defacing, may argue, against contrary presumption, the Testator's minde, that it should continue as part of his Will. But now let us consider of more expresse Revocation, and to that purpose will I relate a late Decree in the *Chancery*, made by the Lord Keeper, according to the opinion of the Master of the Rolls, three Judges, and two Doctours, Masters of the Court, between *Robert Eyre* and *William Eyre* Complainants, and *Hester*, late Wife of *Christopher Eyre* their Brother, and now Wife of Sir *Francis Wortley*, Defendant: Thus was the Case. The said *Christopher Eyre*, 15 *Jacobi*, by his last Will and Testament giveth and bequeatheth to the said *Robert Eyre* his Brother an hundred pounds, and to the said *William* his Brother a thousand pounds, and gives to the said *Hester* his Wife all the residue of his Estate, and makes and ordains the said *Hester* his sole and onely Executrix, saving, for the per-

performance of his Will, he orders *Robert Eyre* and *William Eyre*, his said Brothers, and intreats them to joyn as Executors in trust with his Wife, for the better performance of this his last Will. Afterwards, *Jan. 5. 1624.* being sick of the Sicknefs, whereof he died, he was moved by Master *Dampart* and Master *Stone* to lettle his Estate : to which motion he yielded : and Master *Stone* and Master *Dampart* did demand of the said *Christopher* what Friend he thought fittest to be his Executor, and to whom he would commit the care of discharging his Funerals, and performing his Will, whether he trusted any person more then his Wife to be his Executor. To whom he answered, That his Wife was the fittest person for that purpose, and therefore should be his sole Executrix. And then the Testator was moved by Mr. *Stone* to give and bequeath Legacies to his Father, to his Brethren, and to his Kindred : whereupon he answered, he would give or leave them nothing. And being farther put in mind to remember his Friends and others, gave and bequeathed to *Lionel Atwood*, his God-child, twenty or thirty shillings. And being there-

thereupon moved by his Wife to give him
said God-son more, or a greater Legacy
or the like in effect, he said, Thou knowest
not what thou doest, do not wrong thy
self; twenty shillings or thirty shillings
is money in a poor bodie's purse, or the
like in effect: and the rest he left to his
Wife's discretion or disposition. And
the said Testator did speak the words a-
foresaid, or the like in effect, *animo te-
standi & ultimam Voluntatem declarandi*
as the Witnesses then present did con-
ceive.

Ord. 27. Jun.
2. 2 Caroli
Regis.

This Will was proved by the Oath of
the said *Hester*, and this Codicill being
pleaded as a Revocation of the said Be-
quests, the said Master of the Rolls
Judges and Doctors, were by the Lord
Keeper and the Order of the Court de-
sired to reduce the matter upon the Will
and Codicill into a Case, and to certify
their opinions, whether the said Codicill
were a Revocation of the Legacies given
to the Plaintiffs, or not. And they, after
Counsel heard at several times, *viz.* both
common Lawyers and Civilians, and ma-
ny hours spent in conference together, did
finally resolve with one unanimous con-
sent, that the Legacies to the Plaintiffs
given

given were not by the said Codicill revoked, and so certified under their hands. Upon reading whereof *November 25*, Decree being resolved to be made, if cause were not shewn to the contrary *Novemb. 27*; on which day the Defendant's Counsel, before the Lord Keeper, in the presence of the Master of the Rolls and the said three Judges and Sir *John Heyward*, alledging what they could in stay of the said Decree; it was by a general concurrence of opinion decreed, that the Legacies given to the said Plaintiffs should be to them pay'd on our *Lady-even*, with twenty Nobles in the hundred for the detainment thereof.

This case I thought fit to relate somewhat at large, because it pitcheth upon the point of Revocation, without plain, full and exprefs terms. And surely, as Wills are to be made out of disposing Memories and Understandings, so also with deliberate and advised Judgments; and therefore by like reason not to be countermanded or revoked by sick or slight expressions. And this seems to me very agreeable with the rule and reason of the Common Law. For as Reason it self doth dictate, *quod Nihil tam consentaneum est a-*

A a

quitati

quitati naturali, quàm unumquodque dissolvi eodem modo quo conficitur; so hath the Common Law of England, in my understanding, resolved: as for the purpose, If the King present a Clerk to a Church, and he is thereupon admitted, and instituted thereunto; now yet before Induction may this be revoked as a Will may: yet if the King shall after, and before Induction, present another man to this Church, without an expresse Repeal or Countermand of the former Presentation, it shall not hereby be revoked. So if Lands were conveyed to certain Uses, with a clause or power of Revocation; the Sale of the same to another did not revoke the former: but if a State were meerly at will, then the Conveyance to another by the Common Law amounted to a Revocation. Therefore was the Statute made *tempore Henrici 8.* to redress this, *viz.* that where the King had granted Lands or other things to one during his pleasure, this should not be revoked by a Grant to another, without recitall of the former, and Declaration that the King had determined his pleasure.

To help this
was the
Stat. made
27 El. cap. 4.

6 H. 8. cap. 9.

Being now to consider of Relation in
the

the Executor's Assent, it is meet, since these Discourses are principally intended for those who are not grounded Students in or Professors of the Law, that we shew what we mean by Relation, or what it is in Law. Thus therefore be it conceived, that Relation is a kind of fiction in Law, making a thing done at one time to be accepted and reputed, or to have its operation, as if it had been done at another time past. As for the purpose, *A* doth bargain, and sell Freehold Lands to *B* in *August* by Indenture, which is not inrolled till *October* following; yet this hath such Relation to the Date of the Indenture, that if *A* after that, and before the Inrolment, become bound in a Statute, or granted a Rent-charge, or made a Lease for years, or took a Wife, or committed Felony, yet shall none of these be of any force to charge or prejudice the State of *B*, for that the Law adjudgeth him now owner by Relation as from the time of the Date; yea, if a Servant departing in *August*, for some great breach with his Master, do kill his Master in *October*, this is in Law petty Treason, as if he had continued Servant when he did the fact; because

it relates to the malice conceived when he was his Servant. Now then having shewed that a Term or other Chattel real or personal passeth not, nor is transferred in property to the Devisee, untill the Assent of the Executor be thereunto had ; we now put the case that this Assent is not had till a year or some such good space after the Testator's death, and make our Question, whether this shall have Relation to the Testator's death, *viz.* to be in the Law's account as if it had then been ; or, perhaps, to some purposes so to stand, and to others not so. That this is usefull and material to be known, be it thus shewed. One bequeatheth his term of Tithes of an Advowson of an House or Land by him first leased to an under-Tenant for Rent, and dieth in *May*, the Executor assenteth to the Bequest in *October*, between which two times Tithes be set out, the Church cometh void, Rent groweth payable ; now if this Assent shall relate to the Testator's death, the Devisee shall have these, else not. The like Cases may be put of the brood of Cows, Mares and Ews, fallen between the death of the Testator and the Assent ; so also of Fleeces of Sheep shorn, &c.

Now

Now to come to the Point, it is reported by the Lord *Coke* to have been held in the late Queen's time, that this Assent shall, as between the Executor and the Legatee, have Relation to the Testator's death, yet so that if the Executor before his Assent to the Devisee of a Lease committed Waste, now the action of Waste shall be brought against the Executor in the *Tenuit* for the Waste done before, and not against the Devisee in the *Tenet*.

Tr. 41 Eliz. Co. l. 5. f. 12. B. Sanders Case. Vide Plow. ec. of Trespas against a Stranger for taking before Assent, 280. b.

But put the case that the Legatee before the Executor's Assent granted the term to *J. S.*, now if to any purpose this Assent shall have Relation, it shall certainly so be to make good this Grant, as making the Legatee to be estated, and consequently able to grant before the Executor's Assent; yet do I not find any opinion or resolution in the Point, but find it debated at the Bar in the late Queen's time between *Puckering* and *Egerton*, in the Case of Administration granted to *A.*, after her Grant of a free Term left by her intestate Husband; but I find no Resolution therein, nor perhaps wants their material difference betwixt that Case and the other:

P. 25 Eliz.

for there the Devisee had at least an inception of Title by gift of the Owner, wanting onely a circumstance of Assent to perfect it; but here this Woman till Administration had not so, unless, perhaps, the Statute 21. of King Henry the 8th, directing or enjoining Ordinaries to grant Administration, shall amount to a kind of Title *ad rem*, though not yet *in re*. But to return to the Point of *Assent*; Where a Reversion is granted by Deed or Fine, if the Lessee a good time after do attorn, this shall have no Relation to the time of the Grant; so as for Wast committed or Rent grown due between the Grant and Attornment, the Grantee can have no remedy. Therefore it is good for him who buieth, or hath any thing of the Gift of a Legatee, to have the Assent of the Executor before the Sale or Gift well testified; or if the Assent be not had till after, let him take a new Gift, that he may not rest in a doubtful case: for besides the Premises, that great Legist Sir Edward Coke, when he was a practiser (to Mr. Stubbs of Norfolk) for his Fee, gave his Opinion, as I have been confidently informed, that where a Lessee for years being outlawed did grant his Term, and after reversed the

the Outlawry, this did not make good the Grant by Relation, it not being in the Grantor at the time of his Grant. And this hath much affinity with the principal Point; for there, if the Relation help not, the Grant is not good from the Legatee.

Divers Cases of Bequests considered and expounded.

IF a Termour of an House bequeath his House to *B*, without expressing how long he should have it, he shall have the whole Term and number of years. So of Land.

14 Eliz. Dy.
307. Com.
in a Grant,
31 Eliz.

Also of the name of the House, the Orchards, Gardens and Backsides do pass: yea, if the House with the Appurtenances be bequeathed, thereby the Lands belonging to the House, or used with it, do pass, though yet they would not so doe by such words in any Lease, Deed, or Grant. Yet by some Civilians, or Canonists, the Orchard belonging to an House shall not pass by the onely Gift of the House, without some words shewing the Intent of the Testator so to

Sum. Sylv.
286.

be, or except one Gate or Door lead as well to the Orchard as to the House : but some other of them hold, that it doth pass without any such help of circumstance, so as it be adjoyning to the House.

If a Lessee for years give his Term by his Will to *A*, he shall have it without paying any Rent, for the Executors shall pay it for him, as I find in the Summist ; but against Reason, methinks.

Ibid. ut sup.

If one bequeath his Indenture of Lease, his whole state in that Lease passeth. So if one bequeath his Obligation or other Specialty, the Debt or Duty it self shall go to the Legatee ; and by the Canon or Civil Law the very Action it self passeth,

Ibid. ut sup.

viz. as I conceive, ability to sue the Debtor in his own name : but in our Law it is otherwise, the Suit must be in the Executor's name, for a Debt or thing in Action cannot be assigned, except by or to the King ; and onely at the Common Law is the Debt recoverable ; but the Spiritual Court may force the Executor to sue, or let his name be used in the Suit, for and by the Legatee.

Yet 48 E. 3.
12, 13. it is
admitted,
that such a
Devisee of
all Goods,
after Debts
pay'd, shal
have a Duty
resting in
account.

If one bequeath all his Moveables, Debts due to him are not bequeathed, nor Corn, nor Fruit growing on the ground,

ground, nor Stone, nor Timber prepared for Building, as the Canonists and Civilians hold.

On the other side, if one bequeath the moyety of all his Goods, the Legatee shall have onely the moyety of that which remains after Debts payed; for that onely is to be accounted the Testator's which he hath *ultra as alienum*.

By a Bequest of all Utensils or Household-stuff, Plate nor Jewels are not given. 24. 36 H. 8.
Dy. 59. Dy.
ibid. supra,
Sum. Sylv.
286.

If one bequeath to his Wife all her Apparel, she shall not have, as some Civilians say, her Ornaments of Gold or Silver; by which is meant, as I take it, Chains, Jewels, Bracelets, Rings, &c. But others are of contrary opinion, except they be such things as are not lawfull for her to wear.

If a Bed be given by a Will, *Venit ornamentum ejus*, saith the Civilian, that is, the Furniture thereof passeth, *viz.* not onely the Bed, Bed-stead, Bed-cloths, but also the Curtains and Vallans, as I take it. But I think that by gift of a Coach by Will, the Coach-horses pass not; yet perhaps the Furniture of the Coach-horses may pass as appurtenant to the Coach; for so I think they shall doe, rather then by Bequest of the Coach-horses without the Coach.

If

Ibid.

If one bequeath to *A* Meat, Drink and Cloathing, or *Alimenta*; he shall have, saith the Civil Law, also Lodging, Habitation, and all things necessary for the maintenance of life, viz. as I take it, Fire and Washing, &c.

Ibid. b1

If one bequeath to his Daughter ten pounds a year for her Apparelling, and she demandeth none in four years; now shall she not after that time have the Arrerages of this ten pounds by year for the time passed.

Ibid.

If a man bequeath one of his Horses or Cows, not naming which, to *J S*, he is to chuse which he will, so it be not the best of all, saith the Civil Law: and perhaps the mention of that exception grows out of respect to the Herriot, which the Lord should have, or the Mortuary, which the Parson should have.

Ibid.

A man bequeathed thirty pieces of twenty shillings to *A*, twenty to *B*, and ten to *C*, to be had in such a Chest or Casket, and it is found after his death that there be but thirty in all in that Casket or Box; now each shall be abated ratably, saith my Summist, so as *A* shall have fifteen, *B* ten, and *C* five: and this stands with good Reason and Justice; for
so

to each hath a proportionable part. And it were reasonable that it were by Parliament established for Law, that all, both Legatees and Creditors, should be pay'd in like proportion, where the State will not suffice for full payment of each, rather then that an Executor should have power to pay one all, and another nothing: yet if the Testator left sufficient to make good all those sixty pieces bequeathed, *Quere*, if that which is wanting in the Casket shall not be supplied and made up; for if the Cases following found with the same Authour be good Law, it should seem so to be.

If one, saith he, bequeathed to *J S* that which is another man's, and where-
to the Testator hath no right; then ought his Executor to buy it, and give it to the Legatee, or else satisfie him to the full value; and this not onely by the Civil, but also by the Canon Law, and in *foro Conscientie*, saith my Authour. *Sum. Sylv.*
286.

Again, If *A* bequeath to *B* such an Horse by name, and after sell away that Horse, and dieth; now is his Executor bound to answer the value thereof to *B*: and if the Testator after his sale of that Horse had bought another, and called him *Ibid.* 287.

him by the same name as the first; now shall this latter Horse pass to B, saith the Book, except it can be proved that the Testator sold the former Horse of purpose to revoke his Will touching that Bequest.

Ibid. 286.

So again I find, that if one having but a moyety or one half of green Close, or of a Stack of Corn, or other Chattel, doth give the whole, so as the words be apparent to reach to more then his moyety, then must the Executor buy out the other's part for the Legatee, or give him the value: but if the words be but general, so as they may be reasonably satisfied with the Testator's part, no supply shall be made. So also if one, having Goods in pledge, bequeath them, it shall be construed to extend no farther then his right.

Ibid. 284. 2.

A Bequest is made of an hundred pound to be pay'd at a future time, viz. divers years after the Testator's death; a Question is made by the Summist, whether the profit of the money in the mean time shall go to the Legatee, or the Executor: and he resolves with this difference, if the day were given in favour of the Legatee being an Infant, who could not safely receive it any sooner, then he shall have the profit; but if the respite of payment were

were in favour of the Executor, then shall the Legatee have but the bare sum, without any addition of mean profits.

If one bequeath all his Term or Goods to his Executor for payment of his Debts, or Debts and Legacies, it is a void Bequest; because it is no more then the Law would say, if he had said nothing. So if it be generally to perform his Will.

15 Eliz. Dy.
331.

Plow. Com.
545. b.

If one, seized in Fee-simple of Land, bequeath it to his Executor to pay Debts, the Executor hath no state of Free-hold: for if he should, then it must be either for life, which might end by his quick death before Debts paid; or in Fee-simple, which would carry away the Land for ever from the Heir, where perhaps a few years profits might suffice to satisfy the Debts; yea then by death of the Executor the Land should descend to his Heir, and not go to his Executor, who would be Executor of the first Testator.

Co. lib. 8.
96. a.

If one give or grant all his Goods, having Leases for years as well as Moveables, the Leases shall not pass, as was held in the time of K. Edward the sixth. And so also was it admitted in *Portman's Case*. For the word *Bona* comprehendeth onely Moveables, by the better opinion there.

By deed or word in life.
4 E. 6. Bro. Done, &c.
43. Tr. 37
El. in ba.
reg. Portman
ver. Sirames,
or Willis,
divers times
argued.

But

But the Point in that case was pertinent to this place, *viz.* a Bequest in a Will of all the Testator's Goods: and whether thereby a Lease for years passeth or not, was divers times debated, but not resolved, the Judges differing in Opinion in that Point; but in another Point, which made an end of the Case, all agreed. Yet the better Opinion was, as I find in my Report, that a Lease would pass by such words in a Will, though not in a Deed or Grant by word otherwise made; for the Legacies are demandable in the Spiritual Court, where *Bona & Casalla* are taken for all one. See also the Statute of *Marlbr.* giving an Action to the Successor, *Ad repetenda bona prædecess.* Yet an *Eject. custod.* hath been maintained thereupon. So also upon the Statute of Executors, *De bonis asportatis in vita Testatoris*, hath it been resolved, and where Administration is granted, it is onely *omnium Bonorum*, without speaking of Chattels; yet hath the Administrator interest in Leases as well as Moveables. On the other side, the Statute *de Prærog. reg.* mentioning onely Forfeiture *de Catallis*, is clearly extended to Moveables; so also in the Writ of Assize *De catallis quæ in eo capta fuerint*, and in the Writ of

Cap. 28.

4 E. 3. c. 7.
So the Stat.
5 R. 2. of
Forfeiture
of goods by
those who
go beyo:
the Sea.
16. In all
these Goods
are compr-
hended.

of Execution upon a Statute there is onely the word *Catalla*, and not *Bona*: and in the Case reported by *Kelway*, temp. Henry the 7th, it seems *Bona & Catalla* were taken for *Synonyma*, or all one. It doth not appear that these Statutes and Writs were alledged or considered of temp. *Edw. 6.* but in *Portman's* Case the most of them were.

13 H. 7.
Kelw. rep.
35. a.

If one will that his Wife, or any other, shall have, or hold, or enjoy the moyety of his Lease with his Executor, this implieth not that the Executor have the other moyety as a Legacy also, but otherwise as the Law casts it upon him; no more then where the moyety of Fee-simple Land is devised to the younger Son, this shall not make the elder Son to have the other moyety otherwise then by descent, as between *Low* and *Carter* was conceived. But there being a Proviso in the Wife's Bequest, that if she married from the House, then, &c. *Popham*, Ch. Justice, held, that if she married at all, this was a marrying from the House; for she was no longer Widow of that House, though she married with one of that Kindred, and who had no other House, but would dwell in the bequeathed.

Low & Carter's Case,
Tr. 37 El. in
ba. reg.

CHAP. XX.

Of the Executor of an Executor.

See *Flow.*
184. a Debt
against the
Executor of
an Executor.

19 *Ed. 2.* &
14 *Ed. 3.*
Fitz. Execu-
tor 87, &
103.

I Should be taxed of omission, if I should not shew whether the things forespoken of Executors immediate extend also to the mediate or more remote Executors. Assuredly, were I not by the Books otherwise informed, I should think it somewhat strange that the mediate Executor in the fourth, fifth, or farther degree, should not by the rules of the Common Law stand in like plight Executor to the first Testator, as the first and immediate Executor, as well as the Heir and Assignee in the third or thirteenth degree is capable of all advantages in like sort as the first and immediate Heir and Assignee. And indeed, we find both in the time of *Edward* the second and *Edward* the third Execution sued out upon a Judgment and Statute by an Executor of an Executor; and why he might not as well maintain an Action of Debt, &c. I see not. But

I must

I must confess, I find both Books to the contrary before any Statute made in the point, and after an Act of Parliament to enable them to bring Actions, and to make them subject to Actions; yet the Statute speaks nothing of conferring upon them the Testator's Goods. Now if they had title to them before that Statute, and without the help of that Statute, it is strange if they should not be suable for Debts. But since that Statute, and at this day, where by a Will a special Trust is recommended to an Executor, as to sell Land, &c. this not performed in his lifetime shall not be performable by his Executor: contrariwise of an Interest, as to take the Profits of Lands for certain years towards payment of Debts and Legacies. And where the Statute *temp. H. 8.* gives remedy to Executors for recovery of Rents of Inheritance behind in the Testator's life, I doubt not but Executors of Executors are within the equity, as well as within the Statute *9 Ed. 3. cap. 3.* that the Executor who appears at the grand Distress shall answer alone. Yet the Statute *Westm. 2. cap. 23.* for Executors, was taken not to extend to Executors of Executors.

Quod non est lex. So as now in all cases,

B b

except

11 Ed. 5. &
13 Ed. 3.
Fitz. Exec.
78.
25 Ed. 3. c. 5.

19 H. 8. 9, 10.
4 Ed. Dy. 201.
32 H. 8. cap.
37. So 32 H.
8. 28. Leases.
And 32 H. 8.
cap. 33. Con-
ditions. And
13 Ed. cap. 5.
& 27 Ed. cap.
4. of frau-
dulent Con-
veyances.
21 H. 8. cap.
15. for falli-
fying Reco-
veries.
39 H. 6. 45.
7 E. 3. 64.

except of special trust or authority, without the office of Executorship, the Executor of an Executor, how far soever in degree remote, stands as to the points both of Being, Having and Doing, in the same state and plight as the first and immediate Executor.

CHAP. XXI.

Touching Administrators.

OF these also, as standing in much affinity with Executors, it may be by some expected that I should have treated. But first, my excuse is, that these of Executors onely having grown to so great a bulk above expectation, I was unwilling to enlarge it farther.

Secondly, that which in the points of Having and Doing is before set forth and shewed touching Executors, may be applied to and understood of Administrators; though not what is spoken of Being and unbeing, or Revocation of Executorships, and other circumstantial points.

Lastly, I may, perhaps, if these find good acceptance, adde ere long that which
ap-

appertaineth to Administrators distinguished from Executors, or wherein they stand in different state.

CHAP. XXII.

Considerations in Conscience touching payment of Debts, Legacies, and the preferring or respect of persons.

TO the Advertisment, what course Executors are to hold in their payments, I thought good to adde this *in foro Conscientiæ*; That whenas it shall stand in the Executor's Will and Election to pay whom he will and as he will, in respect of equality in the dignity and degree of the Debts, all being for the purpose by the Specialty, and none of Record, and yet he hath not wherewith to pay or satisfie all, here he may have three ways or courses in his eye.

First, where there is equality in the honesty and Conscience of the Debts, there (except in the ability of the parties to bear loss the disproportion may otherwise occasion) methinks it should be most honest and just to pay every one proportion-

I.

nably, and to let the loss of every one to be equal. And the justness of this is taught by the Law, which gives the *Audita querela* for equal contribution in bearing of loss by them who stand in equal degree : so of Legacies.

2. The poverty and inability of some, and the plenty of others, may *in foro Conscientie* justify the paying more to one, and suffering him to lose less, (if any thing) then another. For if the Widow's mite was a greater gift, so a greater loss then more out of abundance. Where Charity finds or may find place or nearness to place of giving, it may find greater motives of preserving from loss : so of Legacies.

3. The nature of the Debts, and so sometimes of Legacies, may be so different, as thence may spring a just motive to disproportion payments, to pay more to one then another, rate for rate, and so to suffer one to lose more then another. One Debt may perhaps be Use for money, or at least money lent for Use ; another may be money freely lent ; another Debt for Land of Inheritance bought ; another Debt for a Lease, Chattels or Moveables, come to the Executor. The first merits the least respect, next the second, then the third, and

and the last the most. But where without any of these motives there is not equality held in the payment, *peccatur* (as I think) *in Conscientiam*. But let every one stand or fall by or to his own, or to him who is greater then his Conscience. This equality Saint *Paul* in another case re- ^{2 Cor. 8. 14.} commends to the *Corinthians*. And *Solomon*, whilst no inequality appeared in the point of right, shewed his disposition to have made an equal division of the Child between the Mothers, who were joynt Claimors and Competitors for it.

See more of Conscience, *Doct.* and *Stud.*

FINIS.

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2. The first part of the paper is devoted to the study of the properties of the function $\phi(x)$ defined by the equation

